FILED
OCT 16 2008
OFFICE OF THE CLERK

No. 08-520

In The Supreme Court of the United States

REV. CHARLES LARSEN,
REV. GREGORY MCNEAR, AND
REV. JAMES LINZEY,

Petitioners,

v.

UNITED STATES NAVY, AND THE
HONORABLE DONALD C. WINTERS,
SECRETARY OF THE NAVY,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Arthur A. Schulcz, Sr.
Counsel of Record
2521 Drexel Street
Vienna, VA 22180
(703) 645-4010

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for the Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

Petitioners are three clergymen who challenged the constitutionality of the Navy's chaplain accession system (CAS) after their applications for chaplain appointments were rejected. They alleged the CAS (1) was based on arbitrary goals that favored specific denominations in chaplain appointments and (2) delegated discretionary civic power to deny or grant chaplain applications to denominational representatives. Although the Navy abandoned its CAS goals during litigation, it continues to use boards dominated by chaplains to accept or reject applications. The Court of Appeals found all petitioners' claims were moot. Petitioners present the following questions for review.

I. Does the Navy's temporary abandonment of its arbitrary denominational accession goals while continuing to use a favored set of denominational representatives as selection board members moot a challenge to its CAS when the evidence shows (1) unchallenged bias in selection rates among denominational groupings in those selection decisions and (2) a favorable relationship between the denominations of the board members' and the successful applicants?

II. May petitioners challenge the Navy's failure to establish a relationship between its chaplain accession goals and identified free exercise needs?

III. Does sovereign immunity prevent a court from awarding equitable relief in the form of constructive credit if such award results in an increase in future retirement benefits?

PARTIES TO THE PROCEEDINGS

The Petitioners, Plaintiffs-Appellants in the Court of Appeals, are Rev. Charles E. Larsen, Rev. Gregory L. Mc Near and Rev. James Linzey, all non-liturgical clergy.

The Respondents, Defendants-Appellants in the Court of Appeals, are the United States Navy and the Hon. Donald C. Winters, Secretary of the Navy.

CORPORATE DISCLOSURE STATEMENT

No party is Corporation.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceedings iii

Corporate Disclosure Statement iii

Table of Contents iv

Table of Authorities Cited viii

Citations of Orders and Opinions 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 2

Statement of the Case 2

Reasons for Granting the Writ 11

I. THE COURT OF APPEALS VIOLATED THIS COURT'S PRECEDENT BY FAILING TO ADDRESS OBVIOUS RELIGIOUS PREJUDICE AND ENSURE THAT JUSTICE WAS DONE. 11

A. The Court of Appeals Violated Precedent by Interpreting the Complaint to Exclude Petitioners' Constitutional and RFRA Claims. 13

B. The Court of Appeals Failed to Follow this Court's Precedent by Carefully Examining Establishment Clause Claims. 17

1. Chaplains are denominational representatives. 19
2. Petitioners' evidence established their claims of systematic and pervasive denominational preference and prejudice. 19
3. The evidence showed the Navy had a favorite set of denominations it used to fill its CARE board memberships 20
4. The Navy's use of chaplains as CARE Board members violates the Establishment Clause by delegating discretionary civic power to denominational representatives without Constitutional safeguards or guarantees. 21
5. The Court of Appeals was obligated to apply strict scrutiny to the Navy's denominational preferences. 22

II. THE COURT OF APPEALS VIOLATED THIS COURT'S PRECEDENT BY FINDING THE NAVY'S DECISION TO END ITS ARBITRARY ACCESSION QUOTAS MOOTED THE CASE 23
A. The Court of Appeals Improperly Abrogated This Court's Precedent Establishing the Burden To Show Mootness 26
B. The Court of Appeals Violated This Court's Precedent by Ignoring Petitioners' Challenge to the Navy's Continuing Use of Chaplains as Care Board Members To Award or Deny Benefits to Clergy Which Prevented the Case from Being Moot 29
C. The Court of Appeals Violated Precedent by Ignoring Petitioners' Challenge to the Navy's Failure to Establish a Constitutional Nexus Between its Chaplain Corps Composition and the Navy's Free Exercise Needs 32
III. FEDERAL COURTS HAVE INHERENT EQUITABLE AUTHORITY TO FASHION APPROPRIATE REMEDIES VINDICATING THE VIOLATION OF CONSTITUTIONAL RIGHTS. 34
A. Courts Have Authority to Fashion Remedies To Vindicate

Constitutional Rights When No Alternative Remedy Is Available. 35

B. Appellants Qualify for a *Bivens* Type Remedy. 38

Conclusion 41

Appendix

Opinion of the U.S. Court of Appeals for the District of Columbia Circuit entered April 29, 2008 . A-1

Order of the U.S. Court of Appeals for the District of Columbia Circuit denying the petition for rehearing en banc entered July 18, 2008 A-16

Memorandum Opinion of the U.S. District Court for the District of Columbia granting the Defendants' motion for summary judgment entered April 30, 2007 . . . . . A-18

Memorandum Opinion of the U.S. District Court for the District of Columbia granting in part and denying in part Defendants' motion to dismiss entered November 18, 2004 . . . . . A-73

TABLE OF AUTHORITIES CITED

Cases

Agostini v. Felton, 521 U.S. 203 (1997) 18

Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993) 25

Bazemore v. Friday, 478 U.S. 385 (1986) 13

Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007) 13

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 35, 38

Board of Ed. of Kyrias Joel v. Grumet, 512 U.S. 687 (1994) 3, 21, 22

Bush v. Lucas, 462 U.S. 367 (1983) ... 35, 36, 40, 41

Carlson v. Green, 446 U.S. 14 (1980) 35, 38

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290 (D.C. Cir. 2006) 18, 31

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 17, 31

Conley v. Gibson, 355 U.S. 41 (1957) 13, 15, 16

County of Allegheny v. ACLU, 492 U.S. 573 (1989) 22

Davis v. Passman, 442 U.S. 228 (1979) 35, 36, 38, 39

Dilley v. Alexander, 627 F.2d 407 (D.C. Cir. 1980) 39

Doe v. Harris, 696 F.2d 109 (D.C. Cir. 1982) 29

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 37

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) . 23, 26, 29

Gillette v. U.S, 401 U.S. 437 (1971) 11, 17

Goldman v. Weinberger, 475 U.S. 503 (1986) . 10, 17

Hernandez v. C.I.R., 490 U.S. 680 (1989) 23

Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) . . 4, 25

Larkin v. Grendel's Den Inc., 459 U.S. 116 (1982) 21, 22, 31

Larsen v. United States Navy, 525 F.3d 1 (D.C. Cir 2008) 1

Larsen v. United States Navy, 346 F.Supp.2d 122 (D.D.C. 2004) 1, 34

Larsen v. United States Navy, 486 F.Supp.2d 11 (D.D.C. 2007) 1

Lemon v. Kurtzman, 463 U.S. 602 (1971) . . 9, 17, 23

Marbury v. Madison, 5 U.S. (1 Cranch), 137 (1803) 34, 37

Parents Involved in Community Schools v. Seattle School Dist. No. 1, 127 S.Ct. 2738 (2007) 28

Powell v. McCormack, 395 U.S. 486 (1969) 30

Steffel v. Thompson, 415 U.S. 465 (1974) 12, 17

U.S. v. W. T. Grant Co., 345 U.S. 629 (1953) . . 26, 27

Walz v. Tax Commission, 397 U.S. 664 (1970) 11, 17

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 35, 40

Constitutional Provisions

U.S. Const. amend. 1, Establishment Clause passim

U.S. Const. amend. 5 , Due Process Clause . . passim

Statutes

10 U.S.C. § 6031 19

28 U.S.C. § 1254. 1

28 U.S.C. § 1331 ..... 2, 36

28 U.S.C. § 1343 2

28 U.S.C. § 1346 2

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq. 9, 13, 14, 16, 34

Regulations

Department of Defense Instruction 1304.28 19

Department of Defense Directive 1304.19 19

Rules

Fed. R. Civ. P. 8 ..... 13, 15

Other Authorities

E. Borchard, *Declaratory Judgments* 35-37 (2d ed. 1941) 30

CITATIONS OF ORDERS AND OPINIONS

The opinion and judgment of the panel for the United States Court of Appeals for the District of Columbia finding Petitioners' claims moot is reported as *Larsen v. United States Navy,* 525 F.3d 1 (D.C. Cir 2008), and is set forth in the Appendix beginning at A-1. The opinion and judgment of the United States Court of Appeals for the District of Columbia denying Petitioners' en banc petition is unreported, and is set forth in the Appendix beginning at A-16. The opinion and judgment of the District Court for the District of Columbia granting Respondents' motion for summary judgment and denying Petitioner's motion for summary judgment is reported as *Larsen v. United States Navy*, 486 F.Supp.2d 11 (D.D.C. 2007), and set forth in the Appendix beginning at A-18. The opinion and judgment of the District Court for the District of Columbia granting in part and denying in part Respondents' motion to dismiss is reported as *Larsen v. United States Navy*, 346 F.Supp.2d 122 (D.D.C. 2004), and is set forth in the Appendix beginning at A-73.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the District of Columbia entered judgment for which review is sought on April 29, 2008 and denied Petitioners' Petition for rehearing en banc on July 18, 2008. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254. The District Court had jurisdiction over these

actions under 28 U.S.C. §§ 1331, 1343 and 1346.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Establishment Clause of U.S. Const. amend. 1 provides that "Congress shall make no law respecting an establishment of religion ...."

The Due Process of Law Clause of U.S. Const. amend. 5 provides, in relevant parts, as follows: "...nor shall any person be...deprived of life, liberty, or property, without due process of law...." .

STATEMENT OF THE CASE

This case highlights the startling failure of the lower courts to carefully examine and address obvious religious prejudice, denominational favoritism and the fusion of civic and religious power in the Navy's policies and practices in awarding commissions to chaplain applicants. Petitioners' evidence showed (1) for 15 years the Navy established arbitrary chaplain accession goals unrelated to the Navy's free exercise needs that favored liturgical Protestant denominations, (2) an established hierarchy of religious preferences for liturgical clergy and gross discrimination against non-liturgical clergy, especially the Chaplaincy of Full Gospel Churches ("CFGC") which endorsed Rev. Linzey; (3) the Navy had a favorite set of denominations for the Chaplain Accession and Recall Eligibility ("CARE") board memberships which approve or deny chaplain applications and (4)

applicants from the favored denominations do better than applicants whose denominations are not the Navy's favorites, *i.e.*, denomination influenced who was given or denied government benefits. Both lower courts invoked mootness to avoid addressing obvious denominational preferences and constitutional questions of delegating to denominational representiaves discretionary civic power to award or deny benefits to other clergy, contrary to *Board of Ed. of Kyrias Joel v. Grumet*, 512 U.S. 687, 697-99 (1994).

1. The Navy Chaplain Corps. An "accession" is a civilian who becomes a Naval officer. Chaplain applicants submit an application packet through a Navy recruiter establishing the applicant meets all criteria for appointment. A CARE board composed of chaplains reviews every applicant's packet for every accession program and recommends whether an applicant should be accepted or rejected. The CARE board has no objective criteria.

The Navy divides its Chaplain Corps (the "CHC") and its personnel into four faith group categories ("FGCs"): Catholic, liturgical Protestant (Lutheran, Episcopal, etc), non-liturgical Christian (Baptist, Charismatic/Pentecostal, Bible Church, etc) and Special Worship. A-3. During the 1960s - 1980s a significant shift in the nations religious demographics took place with a large growth among non-liturgical denominations and significant shrinkages in liturgical Protestants. Prior to mid-1986, the Navy used national

religious demographics to determine its chaplain accession goals for various faith groups. *See Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985) (describing the Army's allocation of chaplain accessions based on demographics so its Chaplain Corps would reflect the nation - similar to Navy's pre-1986 system). Faced with the growth of non-liturgical and loss in liturgical denominations, a 7/31/87 CHC Memorandum announced a new composition of the CHC based on arbitrary FGC percentages which in turn established CAS quotas to support the new composition. "Faith group mix best meets the needs of the naval service when 35% of the Chaplain Corps is Liturgical, 35% Non-liturgical , and 30% other (Roman Catholic, Jewish, Orthodox)." The "other" category established 25% as the CHC's minimum Catholic composition. No Navy document or witness explained the basis for the 35-35-30 (25 & 5) FGC percentages or provided a rationale for the CAS change. This became the "Thirds Policy" because the 35-35-30 split divided the CHC into rough thirds. The Thirds Policy drove the Navy's CAS until three chaplain lawsuits challenged the Thirds Policy's constitutionality and the Navy experienced chaplain recruiting shortages. For some years, the liturgical accession quota was twice the non-liturgical. The Navy stopped setting FGC recruiting goals in late 2000 saying it would take any qualified applicant while a chaplain litigants' summary judgment motion challenging the Thirds Policy was pending in *CFGC v. Winter*, No. 99cv2945 (D.D.C.), and *Adair v. Winter*, No. 00cv566 (D.D.C.).

Petitioners are non-liturgical clergy who submitted chaplain applications which the Navy's CARE board system denied. Petitioners Larsen and McNear were rejected under the Thirds Policy. The Navy told Larsen there were no quotas for his faith group and told Mc Near he was too old but failed to grant him credit for his prior military service which would have made him eligible. The Navy rejected Linzey under the new "no FGC goal" policy, but his recruiter said he would be "more qualified" if he was liturgical clergy instead of a non-liturgical. All petitioners had prior military service.

Learning of the CAS's illegality because of the *CFGC/Adair* litigation, Petitioners challenged their rejection as chaplains under the First and Fifth Amendments and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq. Their Complaint challenged the Navy's: CAS's "policies and goals", "preferential treatment for specific religious traditions", the CAS's fusion of religious and civic power, authority to set arbitrary chaplain faith group accession goals unrelated to the Navy's free exercise needs, discriminatory "policies and practices", which included the CARE board procedures the Navy used to reject Petitioners' applications. Petitioners requested declaratory, injunctive and equitable relief, including constructive credit for retirement purposes for the time they were illegally denied commissions if they were successful in competing for chaplain commissions.

2. Evidence Showing Navy Prejudice. The Navy has three chaplain accession programs: the Chaplain Candidate Program (CCP) allows seminary students to join the Naval Reserve and evaluate the chaplaincy as a career; the D4105-A and D4105-I programs recruit civilian clergy directly onto active duty (A) or the inactive Reserve (I) respectively. Respondents produced over 4,000 applicant CARE Board records from 1985-2005. Petitioners' statistician analyzed these records and found the approval rates in every accession program demonstrated the Navy's clear preference for Catholics (RC) first, Liturgical Protestants (LP) second, with Non-liturgicals (NL) last (4^{th}) in two categories and third in the other. This same prejudice was also evident when the CCP personnel, already commissioned, applied for active duty under the S4105-A (Student Reservist to active duty) program.

Program	RC	LP	NL	SW
CCP	95.0%	82.5%	**75.6%**	88.8%
D4105-A	92.4%	77.0%	**65.7%**	61.4%
D4105-I	96.3%	77.3%	**60.7%**	75.0%
S4105-A	100%	94.0%	**76.8%**	91.3%

Analysis of 1998-2005 CARE Board records identifying the denominations of both board members and applicants show the Navy gave five denominations

60 % of the board memberships revealing the Navy's "favorite" denominations. Chaplain applicants did better or worse than others according to where their denominations ranked in the Navy's hierarchy.

The Navy's Implicit Favorites:	% Recommended for Accession
Tier I: Roman Catholic	96.40
- a faith group cluster composed of one denomination. There was at least one Catholic on most CARE Panels	
Tier II:	85.45
Southern Baptist, Evangelical Lutheran Church, United Methodist, Lutheran Missouri Synod, and 5 others	
- Significant representation on CARE Advisory Group	
Tier III:	79.71
All others	
- Minimal or no representation on CARE Advisory Group	

Petitioners are in Tier III. Statistical examination of the individual accession rates within the non-liturgical category showed wide statistically significant vacancies. Linzey's endorser, CFGC, submitted the second largest number of applicants but had a selection rate of 59.79% well below the overall and non-liturgical accession approval rates.

Analysis of the CARE Board active duty selection rates by Tier show the Navy's same denominational preferences and prejudices.

Active Duty Recommendation Rates

Tier I: Roman Catholic	93.89%
Tier II:	72.26%
Tier III	62.48%

Petitioners' statistician found:

> These patterns are all statistically significant well beyond one chance in a million, in the region of seven standard deviations. There can be "no statistical doubt" that the selection boards are picking "people like us" to add to the Corps, and rejecting "people who are different". And since the only differentiating dimension visible in the records is denomination, it follows that this is religious discrimination.

This evidence showed the (1) Navy used the CARE boards to enforce the prejudicial Thirds Policy's producing the statistically significant discriminatory accession rates above, but (2) even in the absence of the Thirds Policy, the CARE board members still tended to favor and access at higher rates those candidates

whose denominations where similar to the board members.

3. The Procedural History. Granting in part the Navy's Motion to Dismiss, the District Court (1) held sovereign immunity barred Petitioners' claims for constructive credit, A-82-87, and (2) held *sua sponte* RFRA applied *only* to policies that were neutral and of general application and did not cover Petitioners' claims of prejudicial polices, A-107

The parties filed summary judgment motions after discovery. Petitioners attacked the Navy's (a) use of denominational representatives, *i.e.*, chaplains, on CARE Boards as religious government decision-makers awarding or denying government benefits to chaplain applicants; and (b) unrestricted power to set arbitrary accession goals, including no goals, unrelated to free exercise needs. They argued: (1) the Navy's former CAS Thirds Policy (the "Thirds CAS") demonstrated and resulted in clear denominational preferences and should be reviewed under strict scrutiny; (2) the Navy's current CAS failed the tests of the reasonable observer and *Lemon v. Kurtzman*, 463 U.S. 602, 612-13 (1971) because (a) it lacked objective standards based on identified free exercise needs, advancing religion in general and some denominations in particular; and (b) the CARE Board process fused civic and religious power and chaplain CARE board members preferre candidates of their denomination; and (3) the Navy composed boards with favored

denominations whose decisions favored the favored denominations making denominational identity (religion) relevant in the process.

Denying Petitioners' summary judgment motion and granting the Navy's, the District Court held: (1) Petitioners had standing to challenge the new CAS, A-35-38; (2)the Navy's abandonment of its goals rendered Petitioners' claims moot denying them standing to challenge their rejection, A-41-42; (3) granted summary judgment for the Navy because (a) *Goldman v. Weinberger*, 475 U.S. 503 (1986), a Free Exercise case, provided the proper standard to review the Establishment claims, A-47-51; and (b) the current CAS did not warrant either strict scrutiny or examination under *Goldman*, A-54-71.

On appeal, the D.C Circuit rejected Petitioners' argument that the Navy's continued use of CARE boards, an integral part of both past and present CASs that mixed religious and civic power, gave them standing to sue. A-8. Ignoring the Complaint's challenge to the Navy's discriminatory "policies and practices", "preferential treatment for specific religious traditions", fusion of religious and civic power, authority to set arbitrary chaplain faith group accession goals unrelated to the Navy's free exercise needs, the Panel found the entire case moot, A-2, because Petitioners' "challenged only the legality of the Navy's alleged Thirds Policy", A-6, which the Navy had abandoned, A-7, and Petitioners failed to allege or show

that defendants would reinstitute the Thirds Policy at a later time, A-6 & -8. The Circuit declined to consider Petitioners' constructive credit claim as giving them standing to sue, A-9.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS VIOLATED THIS COURT'S PRECEDENT BY FAILING TO ADDRESS OBVIOUS RELIGIOUS PREJUDICE AND ENSURE THAT JUSTICE WAS DONE.

This petition presents a unique and compelling illustration of a danger of which this Court has often warned–the subtle erosion of the protection of the Establishment Clause. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 696 (1970)(opinion of Harlan, J.); *Gillette v. U.S*, 401 U.S. 437, 452 (1971). The lower courts abrogated their twin duties to carefully examine claims of government establishment of religion and to ensure justice is done. As shown in the Statement of the Case and *infra*, there was ample evidence presented below of 20 years of denominational favoritism, religious prejudice, and the forbidden influence of denomination in the award of government benefits and careers. Petitioners' Complaint attacked the policies, procedures and practices that made this prejudice possible, yet the lower courts closed their eyes to the clear evidence of

the Navy's use of favored denominations as CARE board members, who in turn favored and advanced those denominational candidates most like themselves. Whether this blindness occurred due to reluctance to rule against the military or some other reason is not important. The judiciary has the responsibility and duty to measure the actions of the other branches against the yardstick of the Constitution. Where an agency has transgressed constitutional limits, as the evidence here indicates, it is the Courts' duty "to declare the law" and vindicate the rights of plaintiffs wronged by the agency's abuse of authority and power.

Although this Court's precedent refers to the judiciary as a bulwark against the erosion of liberty and prejudice, *Steffel v. Thompson,* 415 U.S. 452, 465 (1974), the lower courts failed to fulfill this function. While mootness is the technical reason provided for dismissal of Petitioners' claims, an objective observer would conclude the real reason was the lower courts failure to carefully examine the overwhelming evidence supporting Petitioners' claims of religious bias and favoritism and fusion of government and religious power. Certiorari should be granted to reassert to the lower courts their non-discretionary duty to seriously examine Establishment Clause challenges on their merits and to address them when the evidence shows obvious denominational preferences.

A. The Court of Appeals Violated Precedent by Interpreting the Complaint to Exclude Petitioners' Constitutional and RFRA Claims.

Fed. R. Civ. P. 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957).[1] Petitioners challenged their rejection as chaplains under the First and Fifth Amendments and RFRA. Petitioners "bring suit against the Navy and the Secretary of the Navy ("defendants") to challenge "the systematic and pervasive religious prejudice in the accession decisions of the [Chaplain] Corps." A-73. The Petitioners challenged the Navy's "Practices", "policies" and "procedures" are common terms plaintiffs use and which this Court has approved in discrimination cases. Ssee *Bazemore v. Friday*, 478 U.S. 385 (1986) (citing "patterns and practices" discrimination claim). It is undisputed the CARE boards are an integral and critical component of the Navy's challenged CAS. The policies and procedures Petitioners challenge include the CARE board procedures the Navy used to reject Petitioners'

---

[1] In *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Court recently abrogated a portion of *Conley*, but did not alter *Conley*'s holding concerning Rule 8's requirements or its purpose.

applications. In denying the Navy's Motion to Dismiss (the "MTD"), the District Court held, Petitioners "bring suit against the Navy and the Secretary of Navy to challenge 'the systematic and pervasive religious prejudice in the accession decisions in the Corps.'" A-73 (quoting Complaint ¶ 2). The District Court acknowledged Petitioners requested relief included an injunction requiring the Navy to establish a nexus between free exercise needs and the CHC's denominational composition to meet them, arguing "an injunction is necessary to 'force the Navy to return to the religious neutrality mandated by the First Amendment.'" A-96 (quoting Petitioners' Opp'n to the MTD at 21). The Court of Appeals' holding that Petitioners challenged *only* the Thirds Policy, A-6, is willful blindness and in conflict with the law of the case. The District Court held "the reasonable reading of the plaintiffs' complaint is that the plaintiffs seek to compete for a position without the Navy subjecting them to an allegedly unconstitutional hiring practice." A-81 .

This Court's precedent forbids lower courts from ignoring the underlying issues of religious prejudice of constitutional magnitude by narrowly reading a a complaint. Petitioners' mountain of evidence showed that religious prejudice permeated the Navy's CAS and verifyied the Complaint's claims that the Navy's challenged policies and practices were discriminatory in violation of the First and Fifth Amendments and RFRA. Despite this evidence, the Court of Appeals found the entire case moot because Petitioners'

"challenged only the legality of the Navy's alleged Thirds Policy." A-6. But Petitioners challenged not only the Thirds Policy, but also the Navy's discriminatory policies and practices that resuled in religious preference and favoritism; the Thirds Policy was but one overt manifestation of these policies and practices. Petitioners raised these other claims, the evidence supported them, and the Court of Appeals was obligated to address them.

The Court of Appeals ignored Rule 8's command that "all pleadings shall be so construed as to do substantial justice." *See Conley*, 355 U.S. at 48. The pleadings and evidence showed denominational prejudice in every chaplain accession program resulting from the policies, practices and procedures targeted in the Complaint. The Panel's narrow construction and misinterpretation of the Complaint is contrary to Rule 8's guiding principle: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* at 48. The Panel frustrated rather than facilitated a decision on the merits, resulting in substantial injustice.

The Court of Appeals ignored Rule 8's purpose, to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. Rule 8 does not require a complaint provide a detailed listing of every mechanism by which that

prejudice is manifested. In this case, such a detailed listing was impossible absent discovery. The CARE boards' proceedings and records are not public records; it was only through an analysis of discovered material that the Navy's hierarchy of denominational favorites and the corruption produced by the use of chaplains as CARE board decision makers was revealed. The Complaint gave notice of the claims of discrimination and prejudice, which was validated by discovery.

The Petitioners claim that the Navy's CAS policies and practices, past and present, are corrupted with religious prejudice and preference, and allowed *and continue to allow* denominational bias to improperly influence Navy accession decisions, in violation of the First and Fifth Amendments and RFRA. The District Court acknowledged that Petitioners "challenge 'the systematic and pervasive religious prejudice in the accession decisions of the Corps.'" A-73. That included the CARE boards along with their composition policies, procedures and practices. The record shows discovery did its job and revealed the role of the CARE boards as the Navy's mechanism for its religious bias and prejudice against non-liturgical clergy such as Petitioners. The Navy's answer and briefs show it understood the nature and scope of Petitioners' claims and there is no indication it was not on notice. The Court of Appeals decision is contrary to the settled rule that a complaint simply give "fair notice of [the claims'] bassis. *Conley*, 355 U.S. at 48

Review of the Court of Appeals' decision in this aspect alone is necessary to reinforce the role of the federal courts as "'the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Steffel*, 415 U.S. at 464 (quoting F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928)). The Court of Appeals is not at liberty to ignore this Court's precedent defining the spirit and purpose of the Federal Rules.

B. The Court of Appeals Failed to Follow this Court's Precedent by Carefully Examining Establishment Clause Claims.

When faced with a claim a that government practice violates the Establishment Clause, careful examination of the practice is required to determine if the practice "furthers any of the evils against which that Clause protects. Primary among those evils have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Committee for Public Education v. Nyquist*, 413 U.S. 756, 794 (1973) (quoting *Walz*, 397 U.S. at 668); *Lemon*, 403 U.S. at 612. This follows from the principle that "the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses." *Gillette*, 401 U.S. at 452 (quoting *Walz*, 397 U.S. at 696 (opinion of Harlan, J.)). This

careful examination is a judicial duty, not a matter of discretion. "If a precedent of this Court has direct application in a case ... the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997)(quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)) (alteration omitted)).

The record plainly demonstrates that the Court of Appeals improperly avoided the obvious Establishment Clause issues presented to it. Had the Court of Appeals conducted the "careful examination" of the challenge practices required by this Court's precedent, it would have recognized (1) the nature of Petitioners' claims, (2) the invasion of protected legal interests defined in its own precedent, *see Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006) ("the pertinent liberty here is protection against government imposition of a state religion or religious preference."), and (3) the continuing harm to the Petitioners from the continuation of the Navy's denominationally corrupted CARE board process that extended and remained beyond the Navy's cessation of its arbitrary FGC cold/quotas, which required rejection the Navy's mootness argument. An examination of Petitioners' claims shows they were viable and supported by the evidence. The Court of Appeals committed prejudicial error by ignoring them contrary to its duty and this Court's precedent.

1. Chaplains are denominational representatives.

Petitioners challenge the delegation of civic power to chaplains because chaplains are hired and used as denominational representatives. Department of Defense (DOD) Directive 1304.19 and DOD Instruction 1304.28 are very clear that chaplains (religious ministry professionals or "RMPs") DODI 1304.28, ¶ E2.1.9, are hired by the military services to represent their religious organizations to the military. The statutes addressing chaplains duties refer to the responsibility to conduct religious services or religious related exercises, *e.g.* funerals. Because the statutes define chaplains duties in terms of religious exercise, 10 U.S.C. § 6031 (Navy-chaplains may conduct public worship), it is apparent that their role and function is distinctly different from other military officers. Their role is as denominational representatives whose sole function is to allow military personnel to exercise their freedom of religion.

Petitioners challenged the Navy's delegation of discretionary civic power to denominational Representatives in both courts below.

2. Petitioners' evidence established their claims of systematic and pervasive denominational preference and prejudice.

The record shows the Navy's CAS produced statistically different selection rates among different religious categories in every chaplain accession program, the S4105-A program, and in requests for active duty. Petitioners' FGC always came out below Catholics and Liturgical Protestants. Nothing in the record provides any explanation for the consistent prejudicial to Petitioners other than the composition of the CARE boards and the denomination of its members.

The statistical evidence shows (1) 5 denominations received 60 % of CARE board memberships, and (2) the denomination of the CARE board members was a factor in determining which clergy applicants were offered chaplain commissions. Petitioners' statistician documented that changes in the Deputy Chief of Chaplains and the composition of the CARE board resulted in changing the Boards' results, reflecting the new denominational influences. This finding is consistent with the evidence showing that denomination matters in the chaplain selection process.

3. <u>The evidence showed the Navy had a favorite set of denominations it used to fill its CARE board memberships</u>.

The Navy gave five denominations 60 % of its CARE board memberships, thereby identifying the Navy's favorite denominations. Analysis of chaplain

CARE board appearances by their denominations shows they fell into three tiers, demonstrating a definite hierarchy of denominational favorites. This evidence is undisputed.

4. The Navy's use of chaplains as CARE Board members violates the Establishment Clause by delegating discretionary civic power to denominational representatives without Constitutional safeguards or guarantees.

Because chaplains are hired as denominational representatives defined by their religious identity, delegating discretionary power to them violate the cor Establishment Clause concept forbidding the fusion of religion and civic power. *Larkin v. Grendel's Den Inc.*, 459 U.S. 116, 125-27 (1982); *Grumet*, 512 U.S. at 697-99. "The Framers did not set up a system of Government in which important discretionary governmental powers would be delegated or shared with religious institutions. . . . Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution." *Larkin*, 459 U.S. at 127.

The Court of Appeals ignored this basic teaching. Petitioners' are entitled to the protections of the

Establishment Clause's prohibition on the government "making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984)(O'Connor, J., concurring)).

Petitioners' statistical evidence established that the denomination of the CARE board members was a significant factor in determining which clergy applicants were offered chaplain commissions. That evidence established the Navy allowed denominational representatives to exercise discretionary civic power on CARE Boards, with no guarantees that "the delegated power [to award or deny benefits] is used exclusively for secular, neutral and nonideologiocal purposes." *Larkin*, 459 U.S. at 125; *Grumet*, 512 U.S. at 703. The Court of Appeals ignored this Court's precedents and the evidence, which lead to but one conclusion: the Navy's *continuing* use of chaplains on CARE boards violated Petitioners' constitutional rights.

5. The Court of Appeals was obligated to apply strict scrutiny to the Navy's denominational preferences.

The undisputed evidence below showed that the Navy has used a favored set off denominations on its CARE boards to award and deny government benefits. This preference spanned both the Thirds Policy period

and the new "no goal" policy. Even if Petitioners applied under the new policy , they still would be subject to an unconstitutional selection process infected with denominational preferences. This Court's precedents mandate strict scrutiny of that practice:

> Our decision in *Larson v. Valente,* 456 U.S. 228 (1982), supplies the analytic framework for evaluating petitioners' contentions. *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the [practice] facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Hernandez v. C.I.R., 490 U.S. 680, 695 (1989). The record is clear the Court of Appeals neither examined the evidence nor applied strict scrutiny.

II. THE COURT OF APPEALS VIOLATED THIS COURT'S PRECEDENT BY FINDING THE NAVY'S DECISION TO END ITS ARBITRARY ACCESSION QUOTAS MOOTED THE CASE

Friends of the Earth, Inc. v. Laidlaw

Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000) explained the standards for determining if a case is moot because a defendant purports to stop a practice challenged in a lawsuit:

> It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S. at 289. "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.' " *Id.* at 289, n. 10 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968). The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. *Ibid.*

These standards apply in civil rights and constitutional

cases such as this. *See Assoc. Gen. Contractors v. City of Jacksonville,* 508 U.S. 656, 662 (1993) ("defendant's voluntary cessation of a challenged [affirmative action program] does not deprive a federal court of its power to determine the legality of the practice.")

Despite the clarity of these standards, the courts below ignored them. The Navy eliminated its denominational or FGC goals/quotas only after the practice was challenged in other chaplain cases. In June 2000, the *CFGC / Adair* plaintiffs filed a summary judgment motion challenging the Thirds Policy and its arbitrary FGC goals/quotas, months before the Navy abandoned its practice in October 2000 (for FY 2001 accessions). Those plaintiffs argued, as plaintiffs do here, that the Establishment Clause requires a relationship between the makeup of the chaplain corps and an objective measure of the Navy's free exercise needs. *See Katcoff*, 755 F.2d at 225-26 (Army established chaplain "quotas based on the denominational distribution of the United States as a whole"). Absent such a relationship, the Navy's chaplain accession program was a federal jobs program for clergy. The Navy presented no evidence it would have changed the policy were it not for the litigation, nor that it would not reinstitute the policyin the future. Instead, the Court of Appeals accepted the Navy's litigation position that its courthouse conversion dropping its arbitrary FGC accession goals made the case moot. This is contrary to this Court's well-established precedent.

A. The Court of Appeals Improperly Abrogated This Court's Precedent Establishing the Burden To Show Mootness

This Court has consistently held that a defendant alleging a case is moot because it has voluntarily ended the challenged practice has a heavy and significant burden to establish mootness. *Laidlaw*, 528 U.S. at 189. The Court of Appeals found the Navy had "abandoned" its Thirds Policy, although the Navy presented no evidence establishing "there is no reasonable expectation that the wrong will be repeated. The burden is a heavy one." *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). The Court of Appeals failed to ensure the Navy met its burden and incorrectly held that it did so.

The Navy's litigation assertions do not even rise to those found insufficient in *W. T. Grant Co.*, where the defendants filed affidavits that "told the court that the [challenged acts] no longer existed and disclaimed any intention to revive them." *Id.* This Court held that "[s]uch a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." *Id.* The Navy presented no authoritative statement disclaiming "any intention to revive" its FGC goals at a later time. The only fact before the courts below was the absence of published FGC goals/quotas beginning in FY 01 after

litigation challenged them and the Navy's litigation position that it had "abandoned" those goals. A-6-7 (citing non-application of goals). No regulation or declaration is in the record eschewing any future use of such goals with different percentages. Abandoning ship is not the same as scuttling a ship; one can always re-board an abandoned ship just as the Navy is now free to renew its FGC accession goals. This Court has required a defendant scuttle a practice, not merely place it in dry dock.

This Court also has placed on defendants the heavy burden to show "there is no reasonable expectation that the wrong will be repeated." *Id.* The Court of Appeals and District Court disregarded that precedent and shifted the burden to Petitioners, requiring them to prove that that defendants would reinstitute the Thirds Policy. A-7. The Court of Appeals' transfer of the burden is a clear violation of this Court's precedent establishing who has the heavy burden to show mootness. The Court's precedent correctly recognizes that defendants alone know their future plans and control their future actions, and plaintiffs should not be required to become mind readers or to make assertions they are unable to establish in court. The heavy burden this Court has imposed on defendants presumes they will return to the challenged practice when the light of judicial scrutiny is gone and requires them to provide evidence they won't. The Court of Appeals had no authority to redefine this Court's mootness burden.

It would have been easy for the Navy to provide a regulation forbidding the use of denominational FGC goals/quotas in the future; the fact it did not take this easy step shows it has retained its claim to do whatever it wants in the future irrespective of its objective free exercise needs. Even if the Navy were to issue such a document, it does not negate the Petitioners' claim that the Establishment Clause requires a nexus between the denominational make-up of the Chaplain Corps and the free exercise needs it exists to serve. *See* I.B *supra* and C *infra*..

The Court of Appeals also ignored this Court's precedent holding that a defendant's continued defense of an abandoned practice and is a strong indicator of an intent to later resume the practice. The Navy has not admitted its Thirds Policy was illegal and it is defending it in every forum it has been challenged. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S.Ct. 2738, 2751 (2007), addressed similar actions as follows:

> In challenging standing, Seattle also notes that it has ceased using the racial tiebreaker pending the outcome of this litigation. Brief for Respondents in No. 05-908, at 16-17. But the district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to

> assign students. Voluntary cessation does not moot a case or controversy unless "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (internal quotation marks omitted)), a heavy burden that Seattle has clearly not met.

The Court of Appeals ignored its own precedent on this score, *Doe v. Harris*, 696 F.2d 109, 113 (D.C. Cir. 1982) ("when a complaint identifies official conduct is wrongful and the legality of that conduct is vigorously asserted by the officers in question, the complainant may justifiably put checked repetition" under different circumstances), despite Petitioners' reliance on it below.

B. The Court of Appeals Violated This Court's Precedent by Ignoring Petitioners' Challenge to the Navy's Continuing Use of Chaplains as Care Board Members To Award or Deny Benefits to Clergy Which Prevented the Case from Being Moot

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. *See* E. Borchard, *Declaratory Judgments* 35-37 (2d ed. 1941). Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969). In *Powell*, a congressman challenged the authority of Congress to exclude him from being seated for a session of Congress and to deny him seniority. The defendants argued the case was moot following Powell's reelection and his seating in the subsequent congressional session. This Court held otherwise: "Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties." *Id.* at 498. "As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute." *Powell*, 395 U.S. at 496-498.

The Court of Appeals ignored Petitioner's continuing interest in having their applications for chaplain considered free from the unconstitutional denominational bias the statistical evidence shows is present. Petitioners specifically challenge the Navy's practice of composing its CARE boards with denominational representatives without "effective" guarantees "the delegated power 'will be used exclusively for secular, neutral and nonideological

purposes.'" *Larkin*, 459 U.S. at 125 (1982) (quoting *Nyquist*, 413 U.S. at 780 (1973)).

The District Court previously recognized the validity of this claim:

> [T]he court reads the plaintiffs' complaint to request an opportunity to be considered for commission in the Corps without an intentionally illegal set of hiring criteria. The court has authority to adjudicate this claim and therefore denies the defendants' motion to dismiss for lack of subject-matter jurisdiction on this point.

A-82. *See also* A-96 ("Petitioners argue an injunction is necessary "to force the Navy to return to the religious neutrality mandated by the First Amendment.")

The Court of Appeals ignored the fact that as long as the Navy continues to use chaplains to award or deny benefits to other clergy, a live controversy exists until a court rules on the constitutionality of the challenged practice. That is an interest sufficient to grant Petitioners standing which even the D.C. Circuit's own precedent recognizes, "the pertinent liberty here is protection against government imposition of a state religion or religious preference." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 302. This not the careful examination of Establishment

Clause claims the Court requires.

C. The Court of Appeals Violated Precedent by Ignoring Petitioners' Challenge to the Navy's Failure to Establish a Constitutional Nexus Between its Chaplain Corps Composition and the Navy's Free Exercise Needs

The Court of Appeals also ignored the fact that Petitioners attacked the arbitrary quotas that flowed from the Thirds Policy, the policies and practices that implemented and developed it, *i.e.*, CARE boards, *and* the Navy's new "no quota" policy on the ground that the Establishment Clause requires a nexus between the denominational make-up of the Navy Chaplain Corps and the free exercise needs which provide its constitutional justification. Petitioners' specifically claimed the Navy's "accession goals since 1988 have been arbitrary, [and] had no relationship to the Navy's free exercise needs", Complaint ¶ 22; and "the Navy's current failure to develop and maintain recruiting goals that are closely related to meeting the [Department of Navy]'s free exercise needs also fails strict scrutiny and violates the First Amendment", Complaint ¶ 32. Petitioners requested injunctive relief precluding "accession goals that are not based on DON's documented religious free exercise needs." Complaint at 25, ¶ 2. A-96 (an injunction is necessary "to force the Navy to return to the religious neutrality mandated by the First Amendment").

It is obvious the failure to have such a nexus, in the context of the Navy's abandonment of a CAS that provided one for a CAS that expressed a denominational preference, sends a message of hostility to non-liturgicals, the same hostility that led to Petitioners' rejection. The Court of Appeals' failure to recognize these claims and the fact the Navy's cessation of its Thirds Policy did not address or resolve them and their implications, is hard to fathom. Had the Court of Appeals obeyed this Court's precedent, it could not have held the case was moot.

The Court of Appeals was faced with Petitioner's simple argument: absent some objective standard of free exercise needs and a plan to meet them by having sufficient chaplains of the appropriate denominations to meet the Navy's free exercise requirements, the chaplaincy becomes a forbidden federal jobs program for clergy because it advances religion in general without a compelling governmental secular purpose. It also violates the Fifth Amendment's Equal Protection requirement because the probability of each sailor receiving appropriate religious ministry is not equal.[2] Rather than acknowledge the constitutional claim before it and its independence from the operation of the

---

[2] An October 1999 Study of Religious Preference of DON documented the wide variance in the clergy-adherent ratios between denominations produced by the Thirds Policy.

Thirds Policy, the Court of Appeals abrogated "the very essence of judicial duty", to "say what the law is", when presented with a constitutional question. *Marbury v. Madison*, 5 U.S. (1 Cranch), 137, 177-78 (1803).

III. FEDERAL COURTS HAVE INHERENT EQUITABLE AUTHORITY TO FASHION APPROPRIATE REMEDIES VINDICATING THE VIOLATION OF CONSTITUTIONAL RIGHTS.

Petitioners allege the Navy's denominational prejudice denied them the opportunity to become chaplains in violation of their First and Fifth Amendment rights and RFRA. Petitioners Larsn and McNear requested specific relief--that if they qualify for commissions, the court order the Navy to award them constructive credit for the active duty time they would have earned had they been legally considered and commissioned. Although Petitioners did not ask for back pay, the District Court construed their requested relief as one for money damages and found sovereign immunity barred it. A-82-87; *Larsen*, 346 F.Supp.2d at 128-130. The Court of Appeals declined to consider the issue because it believed the case was moot, A-9. However, one panel member noted the predicament facing Petitioners: they must state a claim that does not become ripe until they qualify for a chaplain appointment after they reapply once the constitutional

objections are resolved. A-11-14.

The lower courts failed to analyze the precedent of this Court that clearly establishes the authority of the federal courts to vindicate constitutional deprivations caused by federal agencies and their officials. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Hecht Co. v. Bowles*, 312 U.S. 321, 329 (1944)). Courts may fashion remedies to vindicate constitutional rights if Congress has not specifically limited the Court's jurisdiction to do so. *Bush v. Lucas*, 462 U.S. 367 (1983); *Romero-Barcelo*, 456 U.S. at 313.

A. Courts Have Authority to Fashion Remedies To Vindicate Constitutional Rights When No Alternative Remedy Is Available.

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980), establish the authority of federal courts to craft remedies to vindicate constitutional violations in the absence of other remedies, and subsequent cases reaffirm the authority of federal courts to fashion remedies for constitutional violations:

> The federal courts' power to grant relief not expressly authorized by Congress is firmly established. Under 28 U.S.C. § 1331, federal courts have jurisdiction to decide all cases "aris[ing] under the constitution, laws, or treaties of the United States." This jurisdictional grant provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the constitution, *Bell v. Hood*, 327 U.S. 678 (1946), but also the authority to choose among available judicial remedies in order to vindicate constitutional rights.

Lucas, 462 U.S. at 374.

Davis v. Passman is a case on point and shows that Petitioners are entitled to a remedy if their applications are successful. *Passman* held: "The equal protection component of the Due Process Clause thus confers on petitioner a federal constitutional right to be free from gender discrimination which cannot meet [the requirements of strict scrutiny]." 442 U.S. at 235. Because Petitioners raise Fifth Amendment equal protection claims along with their First Amendment religious discrimination claims, *Passman* is the appropriate precedent. It is one of "the long line of cases in which the Court has held that if a right of action exists to enforce a federal right and Congress is

silent on the question of remedies, a federal court may order any appropriate relief." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69 (1992) (citing *Passman*, 442 U.S. at 247, n.27). The Fifth Amendment grants Petitioners the same constitutional right to be free from discrimination that it granted the petitioner in *Passman*, a right courts re obligated to enforce.

> At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. "The very essence of civil liberty," wrote Mr. Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163, 1 Cranch 137, 163, 2 L.Ed. 60 (1803), "certainly consists in the right of every individual to claim the protection of the laws, whenever he

> receives an injury. One of the first duties of government is to afford that protection."

Passman, 442 U.S. at 242. The Court of Appeals ignored Petitioners' argument they were entitled to a *Bivens* type remedy.

B. Appellants Qualify for a *Bivens* Type Remedy.

In *Carlson v. Green*, this Court wrote as follows:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396; *Davis v. Passman*, 442 U.S. 228, 245 (1979). The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens*,

supra, at 397; *Davis v. Passman, supra*, at 245-247.

Carlson, 446 U.S. at 18-19.

Neither the District Court nor Court of Appeals provided any special factors that would counsel hesitation in providing a remedy. Nor did the courts below point to an alternative remedy which Congress "explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18 -19. The lower courts failed to analyze Petitioners' unique situation, which no statute or judicial precedent addresses. If Petitioners had applied for work as Navy civilians and been denied employment on similar grounds of religious prejudice, they would have a claim against the Navy under Title VII of the Civil Rights Act of 1964, and could recover for back pay and other damages. However, if they are successful in their quest for chaplain appointments, Title VII does not apply to the military. Had they been commissioned and then improperly separated, they would be entitled to be made whole by a return to active duty with back pay, entitlements and constructive credit for the time they were illegally separated. *See Dilley v. Alexander*, 627 F.2d 407, 411 (D.C. Cir. 1980) (constructive credit required). Whether civilians or military, Petitioners have no recourse to or through military or Civil Service remedy procedures. Like the District Court, the Court of Appeals did not address Petitioners' unique remediless situation or this

Court's precedents that establish the duty of federal courts to vindicate constitutional violations and make the victims as whole as posssible.

Lucas held that a separate federal remedy for the petitioner's First Amendment violations was not appropriate because Congress had provided a comprehensive scheme to address federal employee-employer relations, including meaningful remedies for violations of employee rights. 462 U.S. at 386. That is not the case here. Congress has provided neither a specific remedy to address the constitutional violations at issue nor restricted in any way a court's authority to address them. "Unless a statute in so many words ... restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Romero-Barcelo*, 456 U.S. at 313. Unlike *Lucas*, the special factors in this case counsel not for hesitation but application of a specific remedy to make Petitioners whole.

Appellants are not seeking back pay but a remedy allowing them to compete for commissions, and, if successful, to be made as whole as possible. *See Lucas*, 462 U.S. at 388. Petitioner Larsen remained in the Naval Reserve and qualified for retired pay as an enlisted man, but one loss suffered is the opportunity to qualify for an officer's pension. Whether Petitioners Larsen and McNear qualify is dependent on factors still to be determined. These Petitioners are seeking equitable, not monetary, relief. As shown below,

without such relief, Petitioners cannot be made whole. Merely allowing them to reapply for a commission now does not place them "in the same position they would have been in had the unjustified or erroneous personnel action not taken place," *see Lucas*, 462 U.S. at 388.

Lucas is clear that when faced with constitutional violations, federal courts are free "to choose among available judicial remedies in order to vindicate constitutional rights." 462 U.S. at 374. Appellants ask for no new cause of action, but merely the application of well-established equity principles of specific relief or restitution to restore that which the Navy has improperly withheld. Not to do so would be manifest injustice.

Because the District Court's decision is contrary to *Passman* and other precedents, and the Court of Appeals refused to address the issue, the Court should find sovereign immunity does not bar Petitioners' right to a remedy for the Navy's constitutional violation, if successful in their applications for commissions. The Court of Appeals acknowledged the case would not be moot if the District Court's decision was wrong,

CONCLUSION

As shown above, this case presents pervasive violations of Supreme Court precedents. This allowed lower courts to avoid addressing longstanding and

continuing pervasive violations of the Establishment Clause's basic command, government should not prefer some denominations above others. The courts avoided other important constitutional issues which, under this Court's precedents, should have been decided on the merits but were not.

Before the Court of Appeals was evidence of gross religious discrimination, part of the "the systematic and pervasive religious prejudice in the accession decisions of the Corps" which Petitioners identified in their Complaint. Also before the Court of Appeals were issues of the continuing fusion of civic and religious power that advantaged some denominations and their applicants for chaplain commissions and prejudiced others, including plaintiffs. This included evidence the CARE boards were permeated with religious bias because the Navy has used a preferred set of denominations for board members and chaplain board members' denominations influence the boards' decisions. The CARE boards continue to be composed of chaplain decision-makers who decide which denominational representative applicants are awarded the government benefits of a commission, just as they were composed under the Thirds Policy, with the same forbidden result. The Court of Appeals did not address these issues because it failed to construe Petitioners' Complaint in a manner to further justice and to carefully examine the Establishment Clause claims that permeate this case, which were validated by Petitioners' evidence.

The Court should grant a writ of certiorari to review the failure of the lower courts to address these obvious continuing constitutional violations and reinforce the duty of the federal courts to follow this Court's binding precedent.

Respectfully submitted,

Arthur A. Schulcz, Sr.
2521 Drexel Street
Vienna, VA 22180
(703) 6450-4010
Counsel of Record for the Petitioners

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888
Counsel for the Petitioners

No. _____

In The Supreme Court of the United States

REV. CHARLES LARSEN,
REV. GREGORY MCNEAR, AND
REV. JAMES LINZEY,

Petitioners,

v.

UNITED STATES NAVY, AND THE
HONORABLE DONALD C. WINTERS,
SECRETARY OF THE NAVY,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

APPENDIX

Arthur A. Schulcz, Sr.
Counsel of Record
2521 Drexel Street
Vienna, VA 22180
(703) 645-4010

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for the Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 7, 2008 Decided April 29, 2008

No. 07-5196

CHARLES E. LARSEN, REVEREND, ET AL.,
APPELLANTS,

v.

UNITED STATES NAVY AND
DONALD C. WINTER, SECRETARY OF THE
UNITED STATES NAVY,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia
(No. 02cv02005)

Arthur A. Schulcz, Sr. argued the cause and filed the briefs for appellants.

Lewis Yelin, Attorney, U.S. Department of Justice, argued the cause for appellees. On the brief were *Jeffrery S. Bucholz*, Acting Assistant Attorney General, *Jeffrey A. Taylor*, U.S. Attorney, *Marleigh D. Dover*, Special Counsel, and *Catherine Y. Hancock*,

Attorney.

Before: RANDOLPH and TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* TATEL.

Opinion concurring in part and concurring in the judgment filed by *Senior Circuit Judge* WILLIAMS.

TATEL, *Circuit Judge*: In this case, three applicants to the Navy Chaplain Corps allege that the Navy maintained a religious quota system for choosing chaplains and that under this system the Navy illegally refused to hire them because they are non-liturgical Protestants. But because the Navy has long since eliminated the challenged policy, plaintiffs' challenge is moot.

I.

To become a Navy chaplain, a person applies to the Chaplain Accession and Recall Eligibility Board (CARE Board), which recommends to the Chief of Chaplains whether to hire the applicant. Plaintiffs Charles Larsen, Gregory McNear, and James Linzey applied to be Navy chaplains between 1987 and 2001, but the CARE Board recommended against hiring them and the Navy rejected all three. During that time, they

allege, the Navy maintained quotas for how many chaplains it would hire from each of four "faith group categories." As we explained in *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C.Cir.2006):

> The Navy divides its chaplains into four categories according to common faith group characteristics: Catholic, liturgical Protestant, non-liturgical Protestant, and "special worship." "Liturgical Protestant" refers to Protestant denominations that trace their origins to the Reformation, retain an established liturgy in their worship services, and practice infant baptism; it includes Lutheran, Episcopal, Methodist, Presbyterian, and Congregational faiths. "Nonliturgical Protestant" refers to Protestant denominations that do not have a formal liturgy or order in their worship services, that baptize only those who have reached the age of reason, and whose clergy generally do not wear religious vestments during services; it includes Baptist, Evangelical, Pentecostal, and Charismatic faiths.

Id. at 294 (citationsomitted). "'Special worship' refers to faith groups, both Christian and non-Christian, that have 'unique or special needs for their worship and

religious practices'; it includes Jewish, Christian Science, Seventh-Day Adventist, Mormon, Buddhist, Hindu, Moslem, Jehovah's Witness, and Unitarian faiths." *Id.* at 295 n. 3 (quoting *Adair v. England*, 183 F.Supp.2d 31, 36 (D.D.C.2002)).

Plaintiffs, all non-liturgical Protestants, allege that until 2001 the Navy had a policy of hiring one-third liturgical Protestants, one-third non-liturgical Protestants, and one-third divided between Catholics and adherents of "special worship" faiths (heavily weighted towards Catholics). According to plaintiffs, this "Thirds Policy," as they call it, discriminated against them because it underrepresented non-liturgical Protestants in the Chaplain Corps relative to their numbers in the Navy. The Navy admits that prior to 2001 it "maintained recruiting goals for each faith group category," Appellees' Br. 10, but asserts that since then it has given no consideration to any applicant's faith group in making hiring decisions. Plaintiffs concede that the Navy "abandoned [its] Thirds Policy ... in 2001." Appellants' Opening Br. 11.

In 2002, plaintiffs filed suit against the Navy in U.S. District Court for the District of Columbia, arguing that the Thirds Policy violated the First Amendment, Fifth Amendment, and Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* They sought declaratory and injunctive relief and an order declaring that if they were hired as Navy chaplains, they should receive "constructive credit" towards their pay and

retirement benefits for the time they were improperly denied positions.

The district court construed plaintiffs' claim for "constructive credit" as a request for money damages and found it barred by sovereign immunity. *See Larsen v. Navy*, 346 F.Supp.2d 122, 128-30 (D.D.C.2004). It dismissed plaintiffs' RFRA claim on a questionable theory advocated by neither party, holding that RFRA had no application to the facially discriminatory policy alleged here because the statute applies only to government actions that are "neutral and generally applicable." *Id.* at 137. The district court later granted summary judgment for the Navy on plaintiffs' remaining claims, finding them largely moot but otherwise unpersuasive. *See Larsen v. Navy*, 486 F.Supp.2d 11 (D.D.C.2007). Plaintiffs now appeal, challenging the district court's RFRA, sovereign immunity, mootness, and First Amendment rulings.

II.

We lack jurisdiction to evaluate the merits of the district court's substantive holdings because we find this entire case moot. "Simply stated, a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631(1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)) (internal quotation marks omitted). "Federal courts lack jurisdiction to decide moot cases because

their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983).

This case is moot because in their complaint plaintiffs challenged only the legality of the Navy's alleged Thirds Policy, but even they admit that the Thirds Policy ended in 2001 and that the Navy now maintains no religious quotas. Plaintiffs nonetheless insist their claim remains live, but each of their three arguments fails.

First, as plaintiffs correctly point out, a defendant's voluntary cessation of a challenged practice moots a case only if the defendant shows that: (1) "'there is no reasonable expectation ...' that the alleged violation will recur," and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Plaintiffs argue that the Navy flunked condition one because it failed to prove that it wouldn't reinstitute the Thirds Policy and condition two because it still uses the CARE Board. As to the first condition, because plaintiffs never allege that the Navy is likely to or even considering reinstituting the Thirds Policy, there is "'no reasonable expectation ...' that the alleged violation will recur." *Id.* (quoting *Grant*, 345 U.S. at 633). Plaintiffs point out that the Navy still has authority to reinstitute the policy, but "the mere power to reenact a challenged [policy] is not a sufficient basis

on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged [policy] likely will be reenacted." *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C.Cir.1997). The record here contains no such evidence. Plaintiffs insist that the Navy's continued defense of the now abandoned Thirds Policy amounts to evidence that the Navy will reenact the policy. In support, it cites our statement in *Doe v. Harris*, 696 F.2d 109 (D.C.Cir.1982), that "when a complaint identifies official conduct as wrongful and the legality of that conduct is vigorously asserted by the officers in question, the complainant may justifiably project repetition." *Id.* at 113. But this case differs significantly from *Harris*. There, the defendant expressly said it would commit the same alleged violation again under certain circumstances, giving the plaintiffs solid evidence indicating that the challenged [policy] likely [would] be reenacted." *Nat'l Black Police Ass'n*, 108 F.3d at 349. Here, by contrast, the Navy has never said it will reenact the Thirds Policy, and plaintiffs have not even alleged as much. As to condition two, the Navy's continued use of the CARE Board is irrelevant because the Board no longer applies any type of religious quota system.

Second, as plaintiffs again accurately point out, a case is not moot if a court can provide an effective remedy. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992). And according to plaintiffs, this court can provide a remedy, namely "a declaration

that the Thirds Policy ... was unconstitutional, their rejection unlawful, and that an injunction be granted preventing its reimplementation." Appellants' Opening Br. 37. But because the Navy already eliminated the Thirds Policy and plaintiffs never allege that the Navy will reinstitute it, any injunction or order declaring it illegal would accomplish nothing-amounting to exactly the type of advisory opinion Article III prohibits. Of course, if the district court's sovereign immunity holding was incorrect, plaintiffs' claim for "constructive credit" might defeat mootness, but because plaintiffs never argue this ground for avoiding mootness, we decline to consider it. *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983) ("[W]here counsel has made no attempt to address the issue, we will not remedy the defect...."). Our concurring colleague is correct that in *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828 (D.C.Cir.2006), we considered an argument against mootness that was only "implied" on appeal, but explicit in the complaint. *Id.* at 833. But here, plaintiffs never raised their constructive credit claim as a ground for avoiding mootness, not even implicitly. Moreover, the *Lesesne* court never said it *was required* to consider the argument the plaintiff inadequately raised. Thus, while *Lesesne* certainly means we *may* consider arguments a plaintiff fails to raise against mootness, we need not do so, especially where, as here, it might force us to resolve a constitutional question.

Even were we to deem this case a live controversy, there is another reason why we would

decline to consider plaintiffs' claim for constructive credit. Because plaintiffs' claim relies on their first being hired as Navy chaplains-a vital condition that has yet to occur-it is unripe. *See Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 425 (D.C.Cir.2007) ("[I]f a plaintiff's claim ... depends on future events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe."(quoting *McInnis-Misenor v. Me. Med. Ctr.*, 319 F.3d 63, 72 (1st Cir.2003))). The concurrence is concerned that delaying resolution of this claim may force these plaintiffs to a difficult decision about whether to reapply. By reaching the merits, however, we would be deciding an issue that will not arise unless plaintiffs are hired as Navy chaplains-something that may never occur. The claim is thus unripe.

Finally, plaintiffs argue that they challenge the Navy's current hiring policy as well as its Thirds Policy. Plaintiffs' complaint, however, focuses on the Thirds Policy. Of the four relevant counts, three challenge "the Navy's chaplain accession goals," yet the complaint itself states that the Navy already "abandoned its policy of providing goals for specific faith group clusters." Compl. 18, 21, 23. The final relevant count alleges that "[t]he Navy has established and maintained an unconstitutional religious quota system." *Id.* at 22. Even on appeal, plaintiffs devote only two paragraphs of their sixty-two-page opening brief to attacking the Navy's current hiring policies, providing virtually no reasoning or citations. Appellants' Opening Br. 50-51.

We decline to revive this case by reading into plaintiffs' complaint an argument not adequately presented. *See Ala. Power Co. v. Gorsuch*, 672 F.2d 1, 7 (D.C.Cir.1982) ("Courts have long declined to render decisions on important questions of far-reaching significance which have not been argued by the party who might benefit therefrom.").

III.

For the reasons stated above, we remand this case to the district court with instructions to dismiss plaintiffs' claim as moot.

So ordered.

WILLIAMS, *Senior Circuit Judge*, concurring in part and concurring in the judgment: While I otherwise join the majority opinion in full, I depart from it as to the plaintiffs' request for "constructive credit." I believe that this request, unlike the other equitable remedies the plaintiffs seek, could save their challenge to the now-abandoned "Thirds Policy" (see Maj. Op. at 3) from mootness. In the end, however, I concur in the court's finding a lack of jurisdiction over plaintiffs' challenge to that policy, as this remedy is itself barred by the government's valid jurisdictional assertion of sovereign immunity.

The plaintiffs accuse the Navy of having engaged

in religious discrimination by refusing to hire them as chaplains. They declare that they are "able and ready" to apply for the chaplaincy again, and they seek an injunction ordering the Navy, should it hire them as chaplains in the future, to accord them "constructive credit" for the years they would have served but for its unlawful discrimination under the Thirds Policy. This additional seniority would entitle the plaintiffs to a higher salary and would make them eligible to receive an officer's pension on retirement, a benefit they would otherwise lack because of the Navy's retirement rules and pension prerequisites.

No one disputes that the plaintiffs allege an injury in fact (the discriminatory refusal to hire). If the court can remedy that injury, their claim is not moot, and per *Lesesne ex rel. B.F. v. District of Columbia,* 447 F.3d 828, 832-33 (D.C.Cir.2006), we may look past a plaintiff's losing arguments to determine mootness from the complaint itself. In *Lesesne,* the plaintiff correctly identified a form of relief that would have forestalled mootness, but she failed to recognize that it had been properly requested in her complaint-instead contending unsuccessfully that it was implied in her demand for "any other relief the Court deems just." *Id.* at 833. Here, by contrast, the plaintiffs correctly note that their complaint requests constructive credit; they merely fail to cite this request as a specific defense to mootness. As in *Lesesne,* however, the fact that plaintiffs' rebuttals to mootness are "without merit" does not prevent us from recognizing that "[their] complaint presented the

District Court with a live controversy." *Id.* at 832-33. The face of the complaint reveals a live claim: the plaintiffs asked for constructive credit and have not received it. The plaintiffs' briefs pressed this remedy on appeal, and their failure to mention it as a defense to mootness hasn't prejudiced the Navy-which acknowledged at oral argument that if constructive credit were not barred by sovereign immunity, the availability of that remedy would cure the mootness problem.

I am uncertain whether some unripeness in the request for constructive credit sweeps it out of the picture, leaving the attack on the Thirds Policy moot. It is true that the sought-after injunction requiring an award of credit would have bite only if the plaintiffs should be appointed as chaplains, and that ripeness normally calls on us not to adjudicate claims that "depend[ ] on future events that may never come to pass." Maj. Op. at 5 (quoting *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 425 (D.C.Cir.2007)). But the events underlying the plaintiffs' *substantive claim*-i.e., their attack on the Thirds Policy-have already occurred: the Navy's refusal to hire them suffices for liability (assuming, as we must, that the plaintiffs would win on the merits), and this refusal has had "its effects felt in a concrete way." *Devia*, 492 F.3d at 424 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). Indeed, the plaintiffs' claims are partially overripe; the Navy's shelving of the Thirds Policy rendered direct judicial relief against it

meaningless and to that extent mooted the claim. The only remaining question is whether a court must wait before addressing the substantive questions on which the surviving meaningful remedy (the constructive credit) depends. But ripeness is a property of claims, not of remedies. If the Thirds Policy were still alive and thus an injunction still useful against it, a court reaching the merits would consider the constructive credit remedy as well. Perhaps the law of remedies would bar such relief as too speculative, but the court would address that as a *merits* issue rather than as a ripeness defense.

Further, to say that the plaintiffs' claims become ripe only once they are hired might put them in the sort of bind that *Abbott Labs.* considered an important argument for ripeness, see 387 U.S. at 152-54, as it would require them to give up their current jobs (and any associated pension guarantees) before they could establish their pension eligibility as chaplains. Resolving the claim now would enable them to choose in light of their legal rights.

Even if we viewed the plaintiffs' request for credit as their "claim" (which seems odd), the predicate event that may or may not "come to pass" is their appointment as chaplains. In assessing the likelihood of that event for ripeness purposes, we must assume *arguendo* the validity of their merits claim. Removal of the discriminatory policy, to be sure, by no means guarantees their appointment, but the plaintiffs offered

some evidence that their prospects would have been good in a nondiscriminatory system, including evidence that, at least at the time of the applications, the Navy was falling short of its chaplain recruitment goals. Again, of course, the potential hardship to the plaintiffs may tilt the balance toward immediate adjudication. *Devia*, 492 F.3d at 427.

Doubtful that ripeness is a bar, and noting that we may "choose among threshold grounds for denying audience to a case on the merits," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999), I believe we can more confidently rely on the government's sovereign immunity defense.

The plaintiffs argue that their request for constructive credit falls within the Administrative Procedure Act's waiver of sovereign immunity for actions "seeking relief other than money damages." 5 U.S.C. § 702. We need not determine whether, under *Hubbard v. EPA*, 982 F.2d 531 (D.C.Cir.1992), such credit is a form of money damages in a strict sense, for Kidwell v. Dep't of the Army and its progeny extend the government's immunity to equitable relief which "in essence" represents a monetary recovery. 56 F.3d 279, 284 (D.C.Cir.1995). As a result, where the relief sought lacks "significant non-monetary value," *Tootle v. Sec'y of the Navy*, 446 F.3d 167, 175 (D.C.Cir.2006), it will be treated as a form of money damages.

A variety of non-financial benefits have been

described as "considerable" in prior cases: the upgrading of a less-than-honorable discharge in *Kidwell*, 56 F.3d at 286, early retirement for an ill service member in *Tootle*, 446 F.3d at 175, and numerous benefits accruing to retired personnel in *Smalls v. United States*, 471 F.3d 186, 190 (D.C.Cir.2006). But here the plaintiffs give no indication of any non-financial consequences to the constructive credit they seek. Rather, they state that "[u]nder existing law, there may be no way to compensate Plaintiffs *financially* for the Navy's illegal denial of a commission," Pls.' Mem. P. & A. Supp. Pls.' Opp. Defs.' Mot. to Dismiss, Doc. No. 9, at 16 (emphasis added), and that "[t]he relief requested focuses on overcoming the Plaintiffs' burden and disqualification *for a pension* caused by Defendants' illegal actions," Larsen Br. 60 (emphasis added).

Because the plaintiffs "bear[ ] the burden of proving that the government has unequivocally waived its immunity," *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C.Cir.2003), and their allegations fail to identify *any* non-monetary benefits to their proposed remedy, I would hold that their request for constructive credit is barred by sovereign immunity.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5196 **September Term 2007**

02cv02005

Filed On: July 18, 2008

Charles E. Larsen, Reverend, et al.,

Appellants,

v.

United States Navy and Gordon R. England, Secretary of the United States Navy,

Appellees.

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge.

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any

member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REV. CHARLES E. LARSEN *et al.*,	:	
Plaintiffs,	:	Civil Action No. 02-2005 (RMU)
v.	:	
THE UNITED STATES NAVY: *et al.*,	:	Documents Nos.: 48, 51
Defendants.	:	

MEMORANDUM OPINION

GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the court on the parties' cross motions for summary judgment. The plaintiffs, Charles Larsen, Gregory McNear and James Linzey, are three non-liturgical Protestant ministers who applied for but were denied commissions in the Navy

Chaplain Corps (the "Corps" or "Chaplaincy").[1] They bring suit against the Navy and the Secretary of the Navy (collectively, the "defendants") to challenge alleged prejudice in Corps hiring practices. Specifically, the plaintiffs allege that the Navy has established religious quotas for Navy chaplain accessions that intentionally favor liturgical clergy in violation of the First and Fifth Amendments.[2] The parties now each seek summary judgment. Because the Navy's current chaplain accession program seeks legitimate military ends while accommodating individual rights to an appropriate (albeit limited) degree, the court grants the defendants' motion for summary judgment and denies the plaintiffs' motion for summary judgment.

II. BACKGROUND

A. Factual Background

Because the facts of the present case are similar to several cases now pending before this court, the court limits its discussion of the plaintiffs' allegations to what is necessary to resolve the instant motion.

---

1 On May 1, 2006, the parties filed a stipulation of dismissal as to a fourth plaintiff, David Myers, which the court approved the same day.

2 On November 18, 2004, the court dismissed the plaintiffs' claims under the Religious Freedom Restoration Act. Mem. Op. (Nov. 18, 2004)

The plaintiffs are non-liturgical ministers, all with prior military service. Compl. ¶ 1. They applied to the Corps at various times in their careers, but the defendants rejected them because, the plaintiffs allege, of a "systematic and pervasive religious prejudice" against nonliturgical faith groups. *Id.* ¶ 2. As part of this prejudice, the Navy favors liturgical Protestants, despite the under-representation of liturgical Protestant service personnel and an overrepresentation of non-liturgical Protestant service personnel in the Navy generally. *Id.* ¶¶ 1-2.

The Defense Manpower Data Center ("DMDC") collects data on the religious preferences of individual Armed Forces members for the Department of Defense ("DOD"). *Id.* ¶ 8. According to the plaintiffs, this data indicates that:

> In stark contrast to their low and declining percentage of [Navy] personnel, the Protestant liturgical chaplain category consistently comprises over 33% of the Chaplain Corps, about three times the actual percentage of [Navy] personnel who identify a religious preference. In contrast, non-liturgical chaplains have never come close to an equivalence of their faith group percentage of those who identify a religious preference.

Id. ¶ 13.

The plaintiffs claim that the over-representation of liturgical chaplains stems from the Navy's conscious decision to insure that liturgical chaplains control the Corps. *Id.* ¶ 18. "Prior to some time around 1988," the defendants based the composition of the Corps on the religious demography of the country. *Id.* ¶ 16. Because proportional representation led to an increased number of non-liturgicals, the Corps became "concern[ed]." *Id.* ¶ 17. The defendants thus abandoned their goal of proportional representation and, in 1988, imposed a "subjective quota system," Pls.' Mot. for Summ. J. ("Pls.' Mot.") at 4, known as the "Thirds Policy," *id.* ¶ 18. Under this policy, the defendants divided the Corps into thirds: Roman Catholic, Protestant liturgical, and non-liturgical Christian and Special Worship. *Id.* Since the defendants implemented their Thirds Policy, their accession goals for chaplain candidates have not only been arbitrary, but have also been a "deliberate misrepresentation of the Navy's free exercise needs ... for the purpose of minimizing the career opportunities for non-liturgical clergy and ... limit[ing] their influence in the Corps and in the Navy, and hinder[ing] the religious rights of non-liturgical personnel." *Id.* ¶ 22. In 2001, the Navy abandoned the Thirds Policy, preferring instead to "take the best qualified candidates, regardless of denomination." Pls.' Mot. at 6.

With regard to the individual plaintiffs, Rev. Larsen spent sixteen years in active duty in the Navy. Compl. ¶ 4(A). He left in 1982 to attend the Dallas Theological Seminary and complete the post-graduate

education necessary to become a Navy chaplain. *Id.* While at Dallas Theological Seminary, Rev. Larsen applied to the Navy's Student Seminary Program, but he was not accepted. *Id.* In 1987, after graduating from Dallas Theological Seminary, Larsen applied to join the Corps, but the Corps rejected him with a letter stating that his non-liturgical faith group had "no quota." *Id.*

Rev. McNear served in the Air Force and the Colorado Air National Guard prior to completing seminary in 1981. *Id.* ¶ 4(B). In 1993, he applied to the Navy to become a chaplain, but he was told he needed additional post-graduate semester hours to meet the Corps' criteria. *Id.* Rev. McNear promptly completed these requirements and reapplied. *Id.* The Navy rejected his application because, among other things, Rev. McNear was too old and did not satisfy the "needs of the Navy." *Id.*, Ex. 8 ¶ 2. According to the plaintiffs, the age explanation was a "sham" because liturgical Protestant candidates received waivers to join the Corps despite their age during the same period, and the "needs of the Navy" is a "code-phrase" for an illegal quota system disfavoring non-liturgical Protestants. Compl. ¶ 4(B).

Finally, Rev. Linzy is endorsed by the Chaplaincy of Full Gospel Churches, a nonliturgical group. *Id.* ¶ 4(D). He spent three years of active duty as an Army chaplain and applied to become a Navy chaplain. *Id.* The Navy rejected his application-despite a shortage of chaplains-and explained to Rev. Linzy

that he would have been viewed more favorably if he were a "baby baptizer"-that is, if he were *not* non-liturgical. *Id.; see also* Compl. ¶ 7(A) (noting that liturgical denominations are sometimes referred to as "high church" or "baby baptizers").

B. Procedural Background

The court last issued a memorandum opinion in this case on November 18, 2004, denying in part and granting in part the defendants' motion to dismiss. In their motion to dismiss, the defendants moved for dismissal for lack of subject-matter jurisdiction and failure to state a claim on which relief can be granted. Mem. Op. (Nov. 18, 2004). Specifically, the defendants argued that the court lacked subject-matter jurisdiction over the plaintiffs' demand to be commissioned as officers, *id.* at 7, that sovereign immunity barred the plaintiffs' request for monetary damages, *id.* at 9, that the plaintiffs failed to allege immediate or imminent injury necessary for constitutional standing, *id.* at 12, that the plaintiffs' claims were barred by the applicable statute of limitations, *id.* at 20, and that the plaintiffs had failed to state a claim under the Religious Freedom Restoration Act, *id.* at 22.

Regarding subject-matter jurisdiction, the court construed the plaintiffs' complaint as seeking the opportunity to compete for commission in the Corps rather than, as the defendants had argued, asking the court to actually commission the plaintiffs in the Navy.

Id. at 7-8. Noting the court's jurisdiction to entertain such claims, *id.* at 7 (citing *Emory v. Sec. of Navy,* 819 F.2d 291, 294 (D.C.Cir.1987)), the court denied the defendants' motion for dismissal. Because the plaintiffs never served as Navy chaplains, the court ruled that monetary damages (in the form of constructive and retirement credit), are inappropriate. Mem. Op. (Nov. 18, 2004) at 11 (citing 5 U.S.C. § 702).

With regard to standing, the court concluded that the plaintiffs' pleadings sufficed, at the motion to dismiss stage, in alleging a concrete plan to reapply to the Corps if the court ordered the Navy to remove the unconstitutional barriers they allege. *Id.* at 17. With this assessment, the court concluded that the plaintiffs' alleged harm was sufficiently imminent to establish standing. *Id.* Finally, the court granted the defendants' motion to dismiss the plaintiffs' Religious Freedom Restoration Act claims, concluding that the plaintiffs do not challenge a law of neutral or general applicability-a prerequisite for suits under that statute. *Id.* at 24-26.

III. ANALYSIS

Because of the procedural complexity of this case, the court takes a step back to briefly recount the plaintiffs' existing claims. The plaintiffs argue that the defendants' past Thirds Policy and its current chaplain accession plan violate the First and Fifth Amendments. Compl. ¶¶ 24-45. They seek declaratory relief, injunctive relief and an order from the court directing

the defendants to eliminate current and past bias and to provide certain remedies to the plaintiffs. *Id.* at 24. As to declaratory relief, the plaintiffs request a judgment that: (1) the Navy's accession policies violate the First and Fifth Amendments, and DOD regulations; (2) the Navy has unlawfully denied Rev. Larsen an opportunity to compete for the Seminary Program, a commission, a career, and a promotion; (3) the Navy's conduct has denied the other plaintiffs an equal opportunity to compete for a commission; and (4) the Navy has unlawfully caused Rev. McNear to lose a career in the Naval Reserve. *Id.* at 24-25. As to injunctive relief, the plaintiffs ask the court to stop the defendants from discriminating in chaplain accession and career development decisions and to stop the defendants from deriving accession goals that are not based on the Navy's religious needs. *Id.* at 25-26. Finally, the plaintiffs ask the court to order the defendants to eliminate vestiges of discrimination, develop a neutral accession system based solely on the religious needs of the Navy Corps and to allow the plaintiffs the opportunity to be commissioned as chaplains if they are otherwise qualified. *Id.* at 26-27.

From a legal perspective, the plaintiffs' case boils down to a constitutional challenge to the Navy's now-extinct Thirds Policy and its current chaplaincy accession policy. The parties have filed cross-motions for summary judgment. The court now turns to the merits of those motions.

A. Subject-Matter Jurisdiction

Before tackling the merits of the plaintiffs' claims, the court must consider the defendants' arguments that the court lacks subject-matter jurisdiction. Specifically, the defendants argue that the plaintiffs' claims are barred by sovereign immunity, Defs.' Mot. for Summary J. ("Defs.' Mot.") at 7, and that the plaintiffs lack standing to challenge both the Navy's past and its current hiring practices, *id.* at 10.

1. Legal Standard for Subject-Matter Jurisdiction

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938); *see also Gen. Motors Corp. v. Envtl. Prot. Agency*, 363 F.3d 442, 448 (D.C.Cir.2004) (noting that "[a]s a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction").

Because "subject-matter jurisdiction is an 'Art. III as well as a statutory requirement[,] no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C.Cir.2003) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)). On a motion to dismiss for lack of

subject-matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). The court may dismiss a complaint for lack of subject-matter jurisdiction only if " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.,* 315 F.3d 338, 343 (D.C.Cir.2003) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)).

Because subject-matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States,* 334 F.3d 61, 64, 69 (D.C.Cir.2003); *Grand Lodge of Fraternal Order of Police v. Ashcroft,* 185 F.Supp.2d 9, 13 (D.D.C.2001). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States,* 782 F.2d 227, 241 (D.C.Cir.1986), *vacated on other grounds,* 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.,* 974 F.2d 192, 197 (D.C.Cir.1992).

2. The Plaintiffs' Claims Are Not Barred by Sovereign Immunity

The defendants argue that the court lacks subject-matter jurisdiction over the plaintiffs' challenge to the Navy's accession practices because "it seeks to completely overhaul the Navy's system of commissioning new officers into its Chaplaincy Corps-a policy constitutionally and statutorily committed to the Navy's discretion[.]" Defs.' Mot. at 7.

At its heart, the plaintiffs seek to compete for a position without the Navy subjecting them to an allegedly unconstitutional hiring practice. Such a claim is precisely within the ambit of the federal judiciary. *Chappell v. Wallace,* 462 U.S. 296, 304 (1983) (stating that "this Court has never held, nor do we now hold, that personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service"); *Dilley v. Alexander,* 603 F.2d 914, 920 (D.C.Cir.1979) (noting that "courts have shown extreme reluctance to interfere with the military's lawful exercise of its discretion over internal management matters," but pointing out that this principle "is wholly inappropriate . . . when a case presents an issue that is amenable to judicial resolution. Specifically, courts have shown no hesitation to review cases in which a violation of the Constitution, statutes, or regulations is alleged").

The defendants rely on *Orloff v. Willoughby,* in

which the Supreme Court noted that "Congress has authorized the President alone to appoint Army officers in grades up to and including that of colonel, above which the advice and consent of the Senate is required." *Id.* at 8 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953)). In *Orloff*, the Court found it "obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief." *Orloff*, 345 U.S. at 91, 73 S.Ct. 534. Despite the seeming unequivocal nature of *Orloff*, however, this circuit has made clear that "[s]ince *Orloff*, the doctrine of nonreviewability of military decisions has undergone considerable modification, as courts have evinced increased willingness to review military actions alleged to contravene express constitutional, statutory or regulatory requirements." *Blevins v. Orr*, 721 F.2d 1419, 1421 (D.C.Cir.1983).

In short, and contrary to the defendants' assertion, "[i]t is the duty of the federal courts to inquire whether an action of a military agency conforms to the law, or is instead arbitrary, capricious or contrary to the statutes and regulations governing that agency." *Dilley*, 603 F.2d at 920. Balanced against the Supreme Court's caution in *Orloff*, the court's role here is "limited but crucial." *Ridgely v. Marsh*, 866 F.2d 1526 (D.C.Cir.1989) (quoting *Blevins*, 721 F.2d at 1421). Accordingly, the court rejects the Navy's contention that its personnel decisions are immune from judicial scrutiny where constitutional wrongs are alleged.

3. Standing

The defendants claim that the plaintiffs lack standing to challenge the Navy's accession practices because they have "failed to demonstrate that they face a concrete likelihood of future injury[.]" Defs.' Mot. at 10. In essence, the defendants claim that the plaintiffs can show neither immediate or imminent injury nor redressability. *Id.* Though the court previously rejected the defendants' challenge to the plaintiffs' standing, its analysis focused on the burdens attending the plaintiffs at the motion to dismiss phase of the litigation, rather than at the motion for summary judgment phase. Because the plaintiffs' burden of demonstrating standing is greater at the summary judgment phase, *Sierra Club v. Envtl. Prot. Agency*, 292 F.3d 895, 898-99 (D.C.Cir.2002), the court must consider the issue anew.

a. Legal Standard for Standing

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. U.S. CONST. ART. III, § 2, cl. 1. These prerequisites reflect the "common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Consequently, "a showing of standing is an essential and unchanging predicate to any exercise of a court's jurisdiction." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C.Cir.1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing. *Lujan*, 504 U.S. at 561; *Steel Co.*, 523 U.S. at 104; *City of Waukesha v. Envtl. Prot. Agency*, 320 F.3d 228, 233 (D.C.Cir.2003) (per curiam). The extent of the plaintiff's burden varies according to the procedural posture of the case. *Sierra Club*, 292 F.3d at 898-99. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct suffice. *Id.*

To demonstrate standing, a plaintiff must satisfy a three-pronged test. *Id.*, 292 F.3d at 898 (citing *Defenders of Wildlife*, 504 U.S. at 560). First, the plaintiff must have suffered an injury in fact, defined as a harm that is concrete and actual or imminent, not conjectural or hypothetical. *Byrd v. Envtl. Prot. Agency*, 174 F.3d 239, 243 (D.C.Cir.1999) (citing *Steel Co.*, 523 U.S. at 103). Second, the injury must be fairly traceable to the governmental conduct alleged. *Id.* Finally, it must be likely that the requested relief will redress the alleged injury. *Id.* Our court of appeals has made clear that no standing exists if the plaintiff's allegations are "purely speculative[, which is] the ultimate label for injuries too implausible to support standing." *Tozzi v. Dep't of Health & Human Servs.*, 271 F.3d 301, 307 (D.C.Cir.2001). Nor is there standing where the court "would have to accept a number of very speculative inferences and assumptions in any endeavor to connect the alleged injury with [the challenged conduct]." *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C.Cir.1980).

b. The Plaintiffs Have Standing to Challenge the Navy's Current Policy

The defendants argue that the plaintiffs lack standing to request prospective relief because the possibility of future harm is speculative or hypothetical. Defs.' Mot. at 11 (citing *City of L.A. v. Lyons*, 461 U.S. 95 (1983)). The court previously considered this issue in addressing the defendants' motion to dismiss and concluded, noting the procedural posture of the case at that time, that general factual allegations of injury resulting from the defendants' conduct may suffice, "for on a motion to dismiss [courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " Mem. Op. (Nov. 18, 2004) at 16 (quoting *Lujan*, 504 U.S. at 561). Thereafter, the court projected that "at the summary judgment stage, the court could not construe the plaintiffs' 'interest[ ] in becoming chaplains' more favorably than the 'some day' plans in *Lujan*-plans which, the Court in *Lujan* noted, lacked concreteness 'or indeed even any specification of *when* the some day will be.' " *Id.*

In assessing standing, the court must consider whether the plaintiffs plan to reapply to the Corps-and, if they do plan to reapply, whether their plan is a mere "some day" intent or hope, or something more-something concrete. *Lujan*, 504 U.S. at 564. An inquiry into the plaintiffs' plan necessarily centers around the plaintiffs' intentions. *Gratz v. Bollinger*, 539

U.S. 244, 261 (2003).

Recognizing the scant record concerning the plaintiffs' intentions on reapplying to the Navy Chaplaincy, the court previously ordered briefing as to "whether each plaintiff is 'able and ready' to apply for a Navy chaplain commission." Order (Aug. 9, 2004). The court's inquiry stemmed from the Supreme Court's explanation in *Gratz* that a plaintiff had standing to seek prospective relief if the plaintiff could demonstrate that he is "able and ready" to apply if the allegedly discriminatory impediment was removed. *Id.* In response, on August 23, 2004, the plaintiffs submitted a memorandum accompanied by declarations from each plaintiff responding to the court's inquiry that " 'yes', I am 'able and ready' to apply for a Navy chaplain commission." Pls.' Supplemental Mem. (Aug. 23, 2004), Ex. 2 ¶ 3; *see also id.*Exs. 3 ¶ 3 & 5 ¶ 3.

Despite the plaintiffs' assertions, the defendants contend that the plaintiffs' readiness and willingness to reapply to the Navy remains speculative. Defs.' Mot. at 12. Although the court concurs with the government's assessment, this characterization does not damn the plaintiffs' standing because the nature of the prospective standing inquiry is inherently speculative, concerning the subjective intent of the suing party. The speculative quality of the plaintiffs' assertions notwithstanding, the plaintiffs' declarations constitute "direct testimonial evidence" of their intent to reapply, *Arrington*, 473 F.3d at 338, which suffices in defeating

summary judgment,[3] *Anderson*, 477 U.S. at 255 (noting that in considering a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true); *see also*, *Gratz*, 539 U.S. at 282, 123 S.Ct. 2411 (Stevens, J., dissenting) (noting that

---

[3] The court notes that the ability of litigants to gain standing by simply declaring their readiness and willingness reduces the standing assessment from the traditional bleeding plaintiff inquiry, to a formulaic pleading requirement. Such superficial formality is equally present in the traditional standing inquiry. *Cf.* B. Woodward & S. Armstrong, *The Brethren* 192 (1981) (noting Justice White's rhetorical question asking "[w]hy didn't the Sierra Club have one goddamn member walk through the park and then there would have been standing to sue?"). Indeed, the court is at a loss to see how a Sierra Club members' walk through the park creates real skin in the game. And with advice of half decent counsel, it seems doubtful that any litigant would fail to demonstrate standing under the current doctrine (e.g., an attorney advising his client to walk through the park or invoke the buzz words "ready and able" before initiating suit). Nevertheless, the Supreme Court has instructed that a litigant has standing by demonstrating readiness and willingness to compete, *N.E. Fl. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fl.*, 508 U.S. 656, 666 (1993), and it is not to this court to second guess that determination, *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (indicating that Supreme Court precedent "must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be").

the plaintiff in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), succeeded in demonstrating standing through a declaration that the plaintiff "still desires to attend the Law School and become a lawyer").

One final note regarding the plaintiffs' readiness to reapply. The defendants argue that for various reasons the plaintiffs do not currently meet the basic threshold qualifications for acceptance into the Navy chaplaincy. Defs.' Mot. at 17-18. For example, the defendants argue that defendants McNear and Larson both fail to meet the current age requirement for accession, that Larson has been unable to obtain an ecclesiastical endorsement, that McNear has not remained in touch with his endorser since first applying to the chaplaincy in 1996, and that McNear has not been hired by a congregation as a pastor. *Id.*

The current Navy Instruction governing basic qualifications for chaplain accession is Secretary of the Navy Instruction 1120.9 ("SECNAVINST 1120.9"). Defs.' Reply in Supp. of Mot. to Dismiss ("Defs.' Reply") at 6, n. 4; Ex. A. The current policy requires that applicants "be able to complete 20 years of active service by age 68." *Id.*, Ex. A at 4. To the defendants, plaintiffs McNear's and Larson's current ages disqualify them from consideration in the chaplaincy, and in turn, strip

them of standing in this case.[4] Defs.' Mot. at 18. The court is not persuaded. Though SECNAVINST 1120.9 has an age requirement which plaintiffs McNear and Larson apparently do not satisfy, that age requirement is not absolute: the Navy can waive this requirement if, *inter alia*,"extraordinary circumstances cause such a waiver to be in the best interests of the Naval Service" or "[w]hen a gross inequity to the applicant would otherwise result." Defs.' Reply, Ex. A at 4. The defendants argue that this exception poses no loophole for the plaintiffs because the fact that the Navy *can* grant a waiver on a case-by-case basis does not mean that all candidates are entitled to one. *Id.* at 7. Though the defendants are correct that the waiver does not create a rule, their argument misses the point. Because the court's immediate inquiry concerns the plaintiffs' standing to bring suit, not the merits of their case, the court's inquiry focuses not on whether the Navy must grant an age waiver to McNear and Larson, but

---

[4] The defendants cite to portions of McNear's and Larson's depositions which do not exist in the record. For example, the defendants cite McNear's deposition at pages 87-88, Defs.' Mot. at 18, but the excerpt provided skips from page 50 to page 94. Defs.' Mot., Ex. 3. Likewise with regard to plaintiff Larson, the defendants cite to Larson's deposition at page 174, Defs.' Mot. at 18, but the excerpt provided ends at page 149. Defs.' Mot., Ex. 4. For this reason, though the court presumes that plaintiffs McNear and Larson do not qualify under the Navy's age requirement, nothing provided by the defendants in the record confirm this fact.

whether such a waiver is possible. *Ranger Cellular v. F.C.C.*, 348 F.3d 1044 (D.C.Cir.2003) (recognizing standing if there is a "realistic possibility" of competing).

The plaintiffs cite numerous instances in which otherwise age disqualified candidates received a waiver from the Navy. Pls.' Reply at 17-18. Because circumstances exist under SECNAVINST 1120.9 under which the Navy would consider McNear and Larson despite their age, their non-qualification under SECNAVINST 1120.9 does not divest them of standing.

To the defendants, the plaintiffs also fail to meet threshold requirements concerning current ecclesiastical endorsements and physical fitness. Defs.' Mot. at 18. The defendants support these claims with citations to non-existent pages of their exhibits. *See Infra* at n. 4. Moreover, the defendants cite no cases suggesting that the plaintiffs must meet every procedural and ministerial prerequisite for application at every stage in a litigation alleging a more grievous and fundamental impediment to their candidacy. Accepting the defendants' arguments would mean that a plaintiff seeking the opportunity to compete must satisfy all of that job's other qualifications throughout the litigation.

Although the plaintiffs bear the burden of demonstrating standing, the court cannot scrutinize their standing under the defendants' particularized arguments without evidentiary support. It suffices for

the court that the plaintiffs declare their present desire, their readiness and their willingness to apply. *Gratz*, 539 U.S. at 282, 123 S.Ct. 2411 (Stevens, J., dissenting). The court presumes that if the time came for the plaintiffs to reapply, they would align all of their ducks regarding the Navy's procedural prerequisites for applicants; they would update their resume, they would renew their ecclesiastical endorsements, they would spit-shine their shoes, and yes, they would get in shape. For purposes of standing, the court only assess whether it is possible for the plaintiffs to meet the eligibility requirements of the Navy, not whether they currently meet every last one.

c. The Plaintiffs Lack Standing to Challenge the Navy's Thirds Policy

Part of the plaintiffs' case challenges the constitutionality of the Navy's now-decommissioned Thirds Policy. Pls.' Mot. at 13-27. The purpose of that policy, as the plaintiffs see it, was "to have the Navy Chaplain Corps reflect the religious denominational and faith group makeup of the American population." Pls.' Statement of Facts in Supp. of its Mot. for Summ. J. at 39. To implement the policy, the plaintiffs contend, the Navy used a formula for computing the accession targets for each of the faith groupings to achieve congruity with the religious demographics of the nation at large. Pls.' Mot. at 3. The plaintiffs challenge the Thirds Policy by providing statistical evidence demonstrating a systematic favoritism for liturgical

Protestants at the expense of non-liturgical Protestants. *See id.* 17.

For their part, the defendants provide their own set of statistical evidence which they contend proves that these accession goals "played no role in determining which candidates received commissions." Defs.' Mot. at 41-45. At the summary judgment stage, the court's role is not to evaluate the parties' evidence or draw factual conclusions. FED. R. CIV. P. 56(c). And a proper evidentiary evaluation of the parties' evidence and expert testimony would ultimately fall to a fact finder, at a later stage in litigation. As elaborated below, however, because the Navy voluntarily abandoned its Thirds Policy and because the plaintiffs present no evidence showing that the Navy took this action merely to avoid judicial review, the plaintiffs' challenge to this policy is moot.

i. Legal Standard for Mootness

Article III's case-or-controversy requirement prohibits courts from issuing advisory opinions or decisions based on hypothetical facts or abstract issues. *Flast v. Cohen*, 392 U.S. 83, 96 (1968). "The doctrine of mootness is a logical corollary of the case or controversy requirement[.]" *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 90 (D.C.Cir.1986). In cases where challenged conduct ceases and "there is no reasonable expectation that the wrong will be repeated, ... it becomes impossible for the court to grant any effectual relief whatever to the

prevailing party, and any opinion as to the legality of the challenged action would be advisory." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). Accordingly, a court may not rule on the merits of a case in which the claim for relief is moot.

Courts must evaluate mootness "through all stages" of the litigation to ensure that a live controversy remains. *21st Century*, 318 F.3d at 198 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) and *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). As a result, "[e]ven where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Id.* (quoting *Clarke v. United States*, 915 F.2d 699, 701 (D.C.Cir.1990)).

A case is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *City of Erie*, 529 U.S. at 287 (internal quotations omitted). An intervening event may render a claim moot if (1) there is no reasonable expectation that the conduct will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violations. *Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 631 (D.C.Cir.2002); *Sellers v. Bureau of Prisons*, 959 F.2d 307, 310 (D.C.Cir.1992). A case is not moot,

however, so long as any single claim for relief remains viable, as the remaining live issues satisfy the case-or-controversy requirement. *Tucson Med. Ctr. v. Sullivan,* 947 F.2d 971, 978 (D.C.Cir.1991) (internal quotations and citations omitted). The burden of establishing mootness rests on the party raising the issue, and it is a heavy burden. *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979); *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953); *Motor & Equip. Mfrs. Ass'n v. Nichols,* 142 F.3d 449, 458-59 (D.C.Cir.1998).

ii. The Plaintiffs' Challenge to the Navy's Thirds Policy is Moot

To the extent that the Navy ever employed a Thirds Policy in its chaplain accession decisions, a fact the parties dispute, this policy has "since been replaced by the current faith group-neutral system[.]" Defs.'Mot. at 18; *see* Pls.' Mot. at 6 (recognizing that the "[d]efendants abandoned any [faith group cluster] specific accession goals or targets" in 2001). In this case, the plaintiffs seek to enjoin the Navy from utilizing unconstitutional policies so that the plaintiffs can compete for membership in the Corps. *See* Mem. Op. (Nov. 18, 2004) at 7 (construing the plaintiffs' complaint as "seeking to compete for a position without the Navy subjecting them to an allegedly unconstitutional hiring practice"). Because the Thirds Policy is no longer in service, an injunction would serve no purpose. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83 (1998).

In *Steel Co.*, the plaintiff challenged a steel manufacturer's failure to report toxic and hazardous chemical storage end emissions statistics as required by statute. After the plaintiff initiated suit, the steel manufacturer voluntarily submitted its reports. For this reason, the Court ruled that injunctive relief-"aimed at deterring petitioner from violating [the relevant statute] in the future," was insufficient for purposes of Article III standing. *Id.*, at 108-109, 118 S.Ct. 1003. In the case, the United States, speaking through an amicus brief, argued that "there is a presumption of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation." *Id.* at 109, 118 S.Ct. 1003 (correction in original). Characterizing this argument as creating a "sword out of a shield," the Court ruled that "[i]t is an immense and unacceptable stretch to call the presumption [of future injury] into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based." *Id.* (citing *Lyons*, 461 U.S. at 109).

Had the plaintiffs in the present case alleged that "a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm." *Id.* at 108. But like the plaintiff in *Steel Co.*, the plaintiffs here do not allege that the Navy plans to reinstate its challenged Thirds Policy. For this reason, the plaintiffs' challenge to the Navy's Thirds Policy is not redressible by court-ordered injunctive relief, and is, therefore, dismissed as moot.

B. The Defendants Are Entitled to Summary Judgment as to the Navy's Current Practice

Having resolved the requisite jurisdictional issues, the court turns now to the pending merits upon summary judgment. Simply put, the issue before the court is whether the Navy's current chaplain accession practice violates the Constitution.

1. Legal Standard for a Motion for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C.Cir.1995). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 32; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving

party's evidence as true. *Anderson,* 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id.*

The moving party may defeat summary judgment through factual representations made in a sworn affidavit if he "support[s] his allegations ... with facts in the record,"*Greene,* 164 F.3d at 675 (quoting *Harding v. Gray,* 9 F.3d 150, 154 (D.C.Cir.1993)), or provides "direct testimonial evidence," *Arrington v. United States,* 473 F.3d 329, 338 (D.C.Cir.2006). Indeed, for the court to accept anything less "would defeat the central purpose of the summary judgment device, which is to weed out those cases insufficiently meritorious to warrant the expense of a jury trial." *Greene,* 164 F.3d at 675.

2. Appropriate Legal Standard of Review for Assessing the Plaintiffs' Establishment Clause and Free Exercise Clause Claims

Under the current naval policy, the Navy "takes

the best qualified candidates, regardless of denomination." Pls.' Mot. at 6; *see also* Defs.' Mot. at 26 (indicating that the policy "does not set any accession goals, guidelines, or quotas for chaplain applicants from any denomination, faith group, or faith group category"). Whereas the Navy's goal in the formerly-employed Thirds Policy was to link the composition of the Navy Chaplaincy to the religious denominational demographics of the community generally, the Navy currently "considers numerous factors" in deriving its chaplaincy accession needs. *Id.* at 30. These factors include: "the breadth of locations where Navy personnel serve," "the unique circumstances of Naval service, which involves personnel isolated on ships sailing all over the world,""the various functions and tasks of chaplain officers outside of religious services including assistance to those of other faith groups and even no faith groups,""the need to keep accession, promotion, and retention in line with other naval communities,""the need to prevent shortages of qualified clergy," "the need to maintain capacity to respond to events requiring quick access to chaplains from different faith groups not stationed on site, such as terror attacks," and "the need to consider administrative necessities in managing an all-volunteer corps." *Id.* (citing exhibits 14 and 16).

In assessing the constitutionality of the Navy's current practice, the court turns to case law concerning the First Amendment's religion clauses. The court ferociously guards the constitutional command that

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. Am. I. Congress "may justify an in-road on religious liberty [however] by showing that it is the least restrictive means of achieving some compelling state interests." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation[.]" *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). Ordinarily, in considering a claim of religious infringement, the court does not take the government's word at face value, but instead conducts an independent inquiry to assess its plausibility. *Id.* (noting that certain stated justifications for infringement on religious liberty would likely not suffice in justifying the infringement and recognizing the government's burden of showing that no alternatives existed to meet those justifications); *see also, Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (recognizing that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

When the claims of religious infringement are levied against the military, however, the Supreme

Court has charted a far different course. Noting that "the military is, by necessity, a specialized society separate from civilian society," *Parker v. Levy*, 417 U.S. 733, 743 (1974), the Supreme Court declared that judicial review of challenges to military action "is far more deferential than constitutional review of similar laws or regulations designed for civilian society," *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986); *Steffan v. Perry*, 41 F.3d 677, 692 (D.C.Cir.1994) (recognizing the highly deferential standard set forth in *Goldman* and that "even the First Amendment must yield at times to the exigencies of military life").

In *Goldman*, the Supreme Court considered a challenge to an Air Force regulation mandating uniform dress for Air Force service members. Goldman, an orthodox Jew, challenged this regulation because, in application, it prevented him from wearing a Jewish head covering, the yarmulke.[5] Justice Stevens, concurring with the majority's disposition, rendered a

---

[5] "Yarmulkes are generally understood to be a form of religious observance. They are commonly seen and accepted in today's society wherever Orthodox Jews are found." *Goldman v. Weinberger*, 475 U.S. 503, 511 n. 1 (1986). These head coverings are the "symbol of [a] faith whose roots are as deep and venerable as Western civilization itself [constituting a] symbol of a great faith from which Western morality and the Judeo-Christian tradition have arisen." *Goldman v. Sec. of Defense*, 739 F.2d 657 (1984) (Starr, J., dissenting from denial of rehearing *en banc*).

concise background of the case:

> [Goldman's] devotion to his faith is readily apparent. The yarmulke is a familiar and accepted sight. In addition to its religious significance for the wearer, the yarmulke may evoke the deepest respect and admiration-the symbol of a distinguished tradition and an eloquent rebuke to the ugliness of anti-Semitism. Captain Goldman's military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission. Moreover, on the record before us, there is reason to believe that the policy of strict enforcement against Captain Goldman had a retaliatory motive-he had worn his yarmulke while testifying on behalf of a defendant in a court-martial proceeding.

With these facts, Justice Stevens editorialized that this was "an especially attractive case" justifying judicial rebuke of the challenged military policy. *Id.* at 511 (Stevens, J., concurring). Nevertheless, Justice Stevens joined the majority in concluding that Goldman's religious liberties in wearing his yarmulke, an unquestioned hallmark of his religious faith, yielded to the military's decision to institute a uniform dress policy

which lacked an exception for religious attire. *Id.* at 511-512. Recognizing that such regulations "may be more objectionable" for the plaintiff, the Court nonetheless took the view that the Air Force's policy, which "encourages the subordination of personal preferences and identities in favor of the overall group mission," was paramount. *Id.* at 508.

In reaching this decision, the Supreme Court rejected the traditional "strict scrutiny" analysis in favor of a more deferential analysis. *Id.* at 507-508. In *Orloff*, the Supreme Court had recognized that "the very essence of compulsory service is the subordination of the desires and interest of individual to the needs of the service." *Orloff*, 345 U.S. at 91. In *Goldman*, the Court extended this reference to "desires and interests" to servicemen in the practice and religious commands of their religious faith. *Goldman*, 475 U.S. at 507 (quoting *Orloff*). In short, because "within the military there is simply not the same [individual] autonomy as there is in the larger civilian community ... when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Id.* at 508 (citing *Parker*, 417 U.S. at 751).

The plaintiffs advocate the use of the traditional strict scrutiny analysis. Pls.' Mot. at 13. And to distance

themselves from *Goldman,* they simply ignore it.[6]

---

[6] The plaintiffs cite *Anderson v. Laird,* 466 F.2d 283 (D.C.Cir.1972) to support their contention that the court need not defer to the military's judgment. Pls.' Mot. at 10. The plaintiffs' reliance on *Laird* is misplaced. In *Laird,* the D.C. Circuit invalidated a program requiring military cadets at the United States Military Academy at West Point, New York, the United States Naval Academy at Annapolis, Maryland, and the United States Air Force Academy at Colorado Springs, Colorado, to attend religious services. The Circuit's decision, comprised of separate concurring opinions by Judges Bazelon and Leventhal, ruled that the forced attendance law violated the Establishment Clause. *Laird,* 466 F.2d at 290. Judge Bazelon held that compulsory church attendance was "absolutely proscribed by the Establishment Clause." *Id.* Yet Judge Bazelon also recognized that if the program's purpose was "of preserving the right to free exercise of religion," it would be constitutionally permissible. *Id.* In fact, as if prescient to the facts of this case, Judge Bazelon continued that "accommodation of the Establishment Clause to permit maintenance of religious personnel and institutions within the military is necessitated ... by the mandate of the Free Exercise Clause that soldiers be given the opportunity to worship." *Id.* n. 36.

Judge Leventhal, for his part, ruled that the compulsory church attendance requirement violated the Establishment Clause, but predicated his ruling on the fact that the military had demonstrated no "military necessity" for the program. *Id.* at 297. Here, by contrast, the Navy explicitly rests their chaplaincy program on such claims of military necessity. *See infra* at 29.

Nowhere in the plaintiffs' motion for summary judgment, their opposition to the defendants' cross-motion for summary judgment, or their reply in support of their motion for summary judgment do the plaintiffs distinguish, let alone cite, *Goldman*. The plaintiffs, instead, cite a litany of cases for the proposition that the court must apply strict scrutiny when a plaintiff alleges preferential treatment based on denominational membership (*a.k.a.*, "denominational preference" cases). Pls.' Mot. at 14 (citing *Larson v. Valente*, 456 U.S. 228 (1982), *Hernandez v. C.I.R.*, 490 U.S. 680, 685 (1989), *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 608-609 (1989), and *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988)). The cases cited by the plaintiffs, however, concern constitutional challenges to government conduct outside of the military context. The irreducible fact remains that claims of religious infringement to military conduct occupies a judicial space of their own.[7]

---

[7] The plaintiffs advocate the use of strict scrutiny because the Navy's accession program, in practice, suggests statistical denominational preference. Pls.' Mot. at 13-14 (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)). A suggestion of denominational preference, demonstrated through statistics, would complicate the court's analysis, and perhaps require judicial application of strict scrutiny, *Orloff* and *Goldman* notwithstanding, *see Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970) (noting that the "course of constitutional neutrality in this area cannot be an absolutely straight line"). If a plaintiff

The plaintiffs' argument for strict scrutiny has some doctrinal appeal given the breadth of cases applying the strict scrutiny analysis. But the ubiquity of strict scrutiny does not prove its application absolute. Along with *Goldman*, the Supreme Court has applied one form or another of relaxed scrutiny "in several cases involving discrete categories of governmental action in which there are special reasons to defer to the judgment of the political branches." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 571 n. 5 (1993). And with regard to cases concerning the religion clauses, "rigidity could well defeat the basic

---

happened into court with hard statistics showing that a current military program worked a statistically significant disparity in treatment between members of different faiths, perhaps the scales would tip away from deference to military judgment and in favor of judicial stewardship of individual rights. Without suggesting that a statistical suggestion of denominational preference would spur the court to conduct fact finding in a battle between statistical experts, the court leaves this determination for another court on another day.

Such a circumstance does not exist in the present case, however. Here, though the plaintiffs allege that the previously utilized accession program created denominational preferences, *see generally*, Pls.' Mot. at 2, the plaintiffs own data shows that under the Navy's current accession policy, accession rates among applicants of different faith groups have "converged," and any previously existing statistical differences "have dissipated," Pls.' Stmt. of Facts ¶ 126 (quoting Pls.' Mot. Ex. 28 (Leuba Decl.) at 65 ¶ CP12).

purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). Therefore, "short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.*

The plaintiffs misread the court's August 22, 2002 Memorandum Opinion in the related *Adair* case as endorsing a strict scrutiny analysis for the present case. In that ruling, the court mentioned strict scrutiny within the context of delineating the plaintiffs' initial burdens in avoiding a pre-discovery summary judgment challenge. *Adair v. England*, 217 F.Supp.2d 7, 14 (D.D.C.2002). That analysis is not at all applicable in the current context, in which the court has occasion to reach the constitutional merits of the case.

In a Memorandum Opinion issued on January 10, 2002 in *Adair*, the court suggested that relaxed scrutiny as articulated in *Goldman* did not apply to the military chaplaincy cases. The court's determination was based, in part, on the nature of the defendants' stated justifications at the time for its policies. *Adair v. England*, 183 F.Supp.2d 31 (D.D.C.2002) (noting that the challenged regulation in *Adair* involved "considerations that are not related to strictly military affairs or to the defense of the country"). There, the government "never tr[ied] to articulate how the

challenged policies and practices-e.g., alleged religious preferences for liturgical Christian chaplains-would further any operational, strategic, or tactical objectives." *Id.* Without the Navy demonstrating a link between the chaplaincy and strategic or national defense concerns, the court was left to conclude that the Navy's interest in creating the chaplaincy constituted only "quality-of-life issues" which were "designed to hire, retain, and promote chaplains to satisfy the religious needs of Navy service members." *Id.* Now, by contrast, the court has before it the Navy's stated justifications for its policy: "Chaplains help prepare and maintain sailors' and marines' ability to engage in combat and other tactical, strategic, and operational missions, directly tying chaplains to the Navy's ability to defend the nation." Defs.' Mot. at 28. The court takes the Navy's statement at its word. *Goldman,* 475 U.S. at 507-509 (instructing that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"). Accordingly, the court concludes that the Navy's interest in developing a chaplaincy is akin to the Air Force's needs in mandating standards of uniformity at play in *Goldman;* that is, it concerns "operational, strategic, or tactical matters." *Goldman,* 475 U.S. at 507-509; *see, e.g., Katcoff v. Marsh,* 755 F.2d 223, 237 (2d Cir.1985) (recognizing that "the morale of our soldiers, their willingness to serve, and the efficiency of the Army as an instrument for our national defense rests in substantial part on the military chaplaincy, which is

vital to our Army's functioning"). For this reason, the relaxed scrutiny employed in *Goldman* is the appropriate level of judicial scrutiny in evaluating how the Navy goes about implementing those goals.

The court has one additional justification for its conclusion. In *Grutter v. Bollinger*, the Supreme Court recognized with approval the assertion of high ranking retired military leaders that a "highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security." 539 U.S. at 329. Both affirmative action programs designed to promote diversity in the military officers corps and the Navy's current chaplaincy accession program do not instinctively implicate national security the way, for example, troop assignments, rules of engagement, or weapons procurement might. But just as the Supreme Court credits the statements of former military officials in asserting that maintaining racial diversity promotes national security, so too does this court credit the Navy's "tying chaplains to the Navy's ability to defend the nation." Defs.' Mot. at 28. In a very real sense, in other words, the Navy's stated interest in operating a chaplaincy corps (which may involve incidental religious discrimination) resounds with equal force as the military's interest in seeking, fostering, and promoting racial diversity in its officers corps (which may involve incidental racial discrimination). *See Grutter*, 539 U.S. at 329, 123 S.Ct. 2325. In both cases, military service demands "the subordination of the

desires and interests of the individuals to the needs of the service." *Orloff*, 345 U.S. at 92.

3. The Defendants' Current Navy Accession Policy Survives Constitutional Scrutiny

Because religion clause cases engender "room for play in the joints," *Walz*, 397 U.S. at 669, the court begins its analysis with mention of the constitutional context of this case. The realities of maintaining a military in a religiously pluralistic nation places the government in a delicate constitutional position given the Establishment Clause and the Free Exercise Clause. On the one hand, "[s]pending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 308-09 (Stewart, J. dissenting). "Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion." *Id.* (emphasis in original); *see also*, 844 (Brennan, J., concurring) (recognizing that the military chaplaincy constitutes a practice "conceivably violative of the Establishment Clause [but] the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment"). It is in the space between the constitutional command against practices respecting an establishment of religion and the command against practices which prohibit the free exercise thereof that

the military chaplaincy rests. With this fundamental understanding of the constitutional difficulties attending the Navy chaplaincy program in mind, the court proceeds.

The plaintiffs challenge the Navy Chaplaincy's current open accession system, which "takes anybody who comes along," by arguing that it lacks a sufficient nexus to the actual Department of Navy free exercise needs-"the constitutional compelling purpose for the Chaplaincy Corps." Pls.' Mot. at 41. Without this nexus, the plaintiffs argue, the Navy "cannot show their means is narrowly tailored to the accomplishment of [the Chaplaincy Corps'] function." *Id.* The plaintiffs ask the court to declare the current system constitutionally invalid and order the Navy to adopt a system tailored narrowly to the Navy's actual free exercise needs.

The plaintiffs' argument, as the court sees it, is this: under normal circumstances, the government may not finance religious programs. The military context, however, constitutes an exception to this general rule because accommodating the free exercise needs of military service members is itself a "compelling interest." Pls.' Mot. at 41-42. To the plaintiffs, in applying the traditional strict scrutiny analysis, the military's accommodation of free exercise (the "compelling interest" in the strict scrutiny analysis) must be narrowly tailored to survive constitutional scrutiny. *Id.* In other words, the Navy is constitutionally permitted to operate a military

chaplaincy *only if* it can narrowly tailor its chaplaincy program to the purpose for its creation-the actual free exercise needs of the military service. *Id.* The court does not share the plaintiffs' understanding.

a. Distinguishing Between Permissive and Mandatory Accommodation

Before evaluating the Navy's chaplaincy program under the relaxed scrutiny standard set forth in *Goldman*, the court takes a moment to highlight an inconsistency in the plaintiffs' constitutional argument which permeates their claims and, ultimately, leads inexorably to its failing. The plaintiffs argue vigorously that the Navy's chaplaincy program serves a compelling interest in satisfying the religious needs of Naval service members. Pls.' Mot. at 6. But to the plaintiffs, that chaplaincy program must be narrowly tailored to the free exercise needs of the military service members it serves. The problem in this approach is that it equates the Navy's compelling interest in organizing a chaplaincy with a constitutional instruction requiring it. In other words, the plaintiffs argument confuses that which the constitution permits and that which it requires.

When the plaintiffs argue that the Navy's chaplaincy satisfies a compelling purpose, they speak of this compelling purpose not in permissibly accommodating the religious needs of the Navy, but in satisfying the constitutional *requirement* that the Navy

accommodate the religious needs of its service members. *See, e.g.*, Pls.' Mot. at 43 (arguing that chaplaincy must meet "the specific or expected Free Exercise needs of [Navy] personnel"). To be clear, the plaintiffs never expressly argue that the Navy must establish a chaplaincy to accommodate the religious needs of the Navy. But their arguments imply it.

The difference is crucial. If the Navy were constitutionally required to organize and constitute a chaplaincy, so as to ensure the free exercise rights of its service members, then the chaplaincy program would have to not only be narrowly tailored to the free exercise needs of the Navy's service members, it would have to be in relative synergy with it. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 562 (noting that a proactive component of the Free Exercise clause is to safeguard religious liberty, which "generally require[s] government to accommodate religious differences").

If, as is the case here, the Navy is permitted, but not constitutionally required, to accommodate religious needs of its members via a chaplaincy program, the Navy's program need not satisfy every single service members' free exercise need, but need only promote free exercise through its chaplaincy program. The program is constitutionally sound if it simply works toward accommodating those religious needs. *See* Arlin Adams, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DEPAUL L. REV. 317, 319 (1988) (discussing the differences between

permissive and mandatory religious accommodation).

To be sure, the court would evaluate how well the chaplaincy program accommodated the service's religious needs whether the chaplaincy was constitutionally required or constitutionally permitted. But if the constitution required a military chaplaincy, a single service member's lack of access to clergy (or any religious need for that matter) would suffice in invalidating the program as a whole. Likewise, if a chaplaincy were constitutionally required, the court would invalidate the program on the suggestion that another means would accomplish greater free exercise ends.

The plaintiffs cite *Katcoff* to support their claim that the Navy's chaplaincy must be narrowly tailored to the religious needs of Naval service members. Pls.' Mot. at 19. In *Katcoff*, the Second Circuit expressed its view that the constitution mandated a military chaplaincy. *Katcoff*, 755 F.2d at 234. The court stated that if the military did not organize a chaplaincy, "the effect of compulsory military service ... would deprive the soldier of his right under the Establishment Clause not to have religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion." *Id.* For two reasons, the court avoids a direct evaluation of this legal assertion. First, though the plaintiffs in *Katcoff* were not conscripted to military service, the court qualified its exposition of constitutional rights to

those serving in "compulsory military service."[8] *Id.* Perhaps in compelled military service situations the Supreme Court's sanction of "the subordination of the desires and interests of the individual to the needs of the service," *Orloff*, 345 U.S. at 92, would resound with less force. But because the plaintiffs in the instant case are not conscripted service members arguing the subversion of their religious freedoms, the court does not have occasion to evaluate the *Katcoff* court's statement regarding the constitutional requirements placed on the government in draft service situations.

Second, the plaintiffs do not expressly argue that the free exercise clause requires a military chaplaincy. Without an explicit argument in this regard, the court does not opine as to the constitutional dimensions of the chaplaincy on such sweeping terms. *Mazer v. Stein*, 347 U.S. 201, 206, n. 5 (1954) (noting that the court does not

---

[8] With minor historic exceptions, however, our military is a volunteer organization. See *Holmes v. United States*, 391 U.S. 936 (1968) (Douglas, J., dissenting in the denial of certiorari) (recounting the history of conscripted military service in the United States). In volunteering, military service members must understand and accept that "the military 'is the executive arm' whose 'law is that of obedience.' " *Parker v. Levy*, 417 U.S. 733, 749 (1974). The court sees no principled reason why this logic would not apply to civilians who are attempting to gain admission into the military, one of its services, or a specialized corps within one of those services.

"reach for constitutional questions not raised by the parties").

According to the Navy, given the diversity of religious beliefs and geographic dispersion of the military, it would be "impossible in any given military unit or community to provide a chaplain for each faith group represented by its members." Defs.' Mot., Ex. 15 at iv. The court accepts the Navy's assertions in this regard, *see Orloff*, 345 U.S. at 92, and the Navy's arguments convince the court in their own right that stationing a chaplain wherever a service member needs one would be a logistical nightmare the execution of which would significancy and perpetually strain military resources. For these various reasons, in evaluating the Navy's chaplaincy program, the court need not assess whether it is perfect in its accommodation of service members' free exercise needs, just whether it is sufficiently tailored to the Navy's interest in permissibly accommodating those religious needs.[9]

---

[9] In addition to confusing permissive and mandatory accommodation, the plaintiffs' argument is not persuasive because it relies, at its core, on the application of strict scrutiny. But as the court previously ruled, strict scrutiny analysis does not apply in this case given the judicial deference accorded the military in decisions concerning military affairs and the understanding that service in the military implies a measured reduction in the rights of service members. *See* discussion supra at 25-29.

b. The Navy's Chaplaincy Program Satisfies the *Goldman* Standard

Under a relaxed standard of review, the court assesses whether "legitimate military ends are sought to be achieved," and whether the program "is designed to accommodate the individual right to an appropriate degree."[10] *Goldman*, 475 U.S. at 505 (quoting *Goldman v. Sec. of Def.*, 734 F.2d 1531 (D.C.Cir.1984)). Assessing the Navy's current chaplain accession system under this two part test, the court rules that it is constitutionally sound.

First, the court rules that the Navy's chaplaincy system seeks "legitimate military ends."[11] *Id.* According to the government, supported by affidavit, the chaplaincy furthers the Navy's mission of national

---

10 Justice O'Conner, dissenting in *Goldman*, lamented the majority's holding because "[n]o test for free exercise claims in the military context is even articulated, much less applied." *Goldman*, 475 U.S. at 528 (O'Conner, J., dissenting). Be that as it may, yet seeking precedential guidance as to the applicable standard of review, the court applies the legal test employed by the D.C. Circuit in its opinion in the case, which the Supreme Court affirmed.

11 The plaintiff seemingly concedes this point by recognizing that the military chaplaincy constitutes a compelling military interest. Pls.' Mot. at 10. Nevertheless, the court's holding does not depend on this concession.

defense. Defs.' Mot. at 28. Marine Brigadier General Joseph Dunford, for example, recognizes that the chaplaincy's contribution to the military "directly influences the will of the individual Marines to fight and the combat effectiveness of our units." *Id.*, Ex. 12 ¶ 2. General Dunford continues that prior to deployment of Marines in the current imbroglio in Iraq, "chaplains were essential in the development of combat leadership, combat stress training, family readiness, and a wide range of other areas. Because chaplains participate in every aspect of unit training, the contribution they make is truly immeasurable." *Id.* He continues with a detailed and thoroughly convincing assessment of the necessity of the Navy Chaplaincy Corps. According to Department of Defense findings presented in its Study of Representation of Religious Faiths in the Armed Forces, Navy Chaplains

> [P]rovide for the religious and moral needs of military personnel, their families, authorized Department of Defense civilians, and retired personnel, with primary attention given to the welfare of the service member. They conduct services of worship, administer rites and sacraments consistent with the chaplains' faith group, and provide a full range of religious activities. They serve as personal counselors and as leaders in religious education and humanitarian services.

Defs.' Mot., Ex. 15 at 3. With these statements, the court concludes that the Navy's interest in maintaining a chaplaincy is important, it is compelling, and therefore, at an irreducible minimum, serves legitimate military ends. *Goldman*, 734 F.2d at 1535; *Katcoff*, 755 F.2d at 234.

The second prong of the court's inquiry evaluates whether the program is "designed to accommodate the individual right to an appropriate degree." *Goldman*, 475 U.S. at 505. The *appropriate* degree of accommodation depends, of course, on the military's need for its program and the compatibility of that program with individual needs. In *Goldman*, the Air Force's strict application of its dress code regulation in practice foreclosed *any* accommodation of individual rights. But such absolute non-accommodation was constitutionally permissible, the court ruled, because "the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations." *Id.* at 508.

A review of the Navy's current chaplaincy accession policy satisfies the court that it is likewise "designed to accommodate the individual right to an *appropriate* degree." *Id.* at 505. Navy "[c]haplains help prepare and maintain sailors' and marines' ability to engage in combat and other tactical, strategic, and operational missions, directly tying chaplains to the Navy's ability to defend the nation." Defs.' Mot. at 28.

Under the current chaplaincy accession system, the Navy assesses its current religious needs by "consideration of the particularized needs of its individual units and installations." *Id.* at 30. The Navy "strives to recruit chaplains of various faith groups [and] does not ... adhere to any quotas." Defs.' Mot., Ex. 14 ¶ 11; Ex. 42 ¶ 4. Instead, the Navy "aims to access only the best qualified applicants regardless of faith group." *Id.* "To determine if an applicant is the best qualified ... a Chaplain Appointment and Recall Eligibility Advisory Group (CARE Advisory Group) meets to consider the [applicant]." *Id.* The religious denominations or faith group identification of individual applicants is "never a factor in recommendations" of the CARE group for accessions. *Id.* Rather, the Navy bases its accession system on many factors, including "the breadth of locations where Navy, Marine, and Cost Guard personnel serve; the unique circumstances of Naval service, which involve personnel on ships sailing all over the world; and the various functions and tasks of chaplain officers outside of religious services." Defs.' Mot., Ex. 16 at 3-4.

Given that it would be "impossible in any given military unit or community to provide a chaplain for each faith group represented by its members," Defs.' Mot., Ex. 15 at iv, the Navy's use of a more relaxed hiring approach, which ignores faith group identifiers, seems reasonable and justified. And given the importance of the Corps to the Navy's needs, the current program does what is possible under the circumstances

to "accommodate the individual right to an appropriate degree." *Goldman*, 475 U.S. at 505.

c. The Plaintiffs' Suggested Alternative

The plaintiffs attempt to highlight the problems in the Navy's program by suggesting an alternative approach. The problem for the plaintiffs, however, is that they utterly fail in suggesting a system which is equally effective at meeting the Navy's needs while also being more accommodating to the rights of either the individual plaintiffs of the average yeoman. Coupling this difficulty with the court's own inability to surmise a process better designed to more closely accommodate individual interests, the court has no reason to reject the Navy's current approach in favor of another.

The Navy possesses a generalized interest in maintaining the Chaplaincy Corps and the plaintiffs' interest in competing for a position in that Corps is not directly or inherently in conflict with the Navy's interest. Nevertheless, the plaintiffs do not seek merely the opportunity to compete for a position in the chaplaincy. Rather, they want to compete in a chaplaincy infused with selection criterion of their choosing.

Under the plaintiffs' proposal, the Navy should base its chaplain selection on the actual religious

demographics of the Navy.[12] Pls.' Mot. at 8. In this way, the plaintiffs suggest, the free exercise needs of the Navy service members will be better accommodated. *Id.* To the plaintiffs, their approach would more closely tailor the Navy's chaplaincy program to the purpose for its creation (*i.e.*, the free exercise needs of Naval service members). The plaintiffs' approach is itself flawed because it confuses religious demographics with religious need. This is so for three principal reasons.

First, under the plaintiffs' suggested plan, numerous religious service members would have no access to clergy of their faith. For example, according to the Navy, "if less than .27 percent of personnel identify themselves as Muslim, proportional representation would require that the Chaplain Corps be composed of only 2 Muslim chaplains. The dispersion of religious needs across the Sea Services would indicate at least a requirement of 10 Muslim chaplains to ensure access to a chaplain of this tradition in every major geographical area." Defs.' Mot. Ex. 14 at 6. In short, according to the Navy, "[s]trict proportionality does not consider effectively the distribution and dispersion challenges of the Sea Services." *Id.*

---

[12] The plaintiffs characterize an accession system based on a blending of national religious demographics and Navy religious demographics as "optimal," but fail to explain how such a blending ensures a better nexus between the chaplaincy and the religious needs of the Navy than the current system. Pls.' Mot. at 8.

Second, the plaintiffs suggestion fails to account for the complexities and variations of religious worship among religions generally and between individual parishioners specifically. Corresponding the chaplaincy's composition to precise demographics assumes that religions each maintain an equal need for chaplains of that particular faith. The Navy characterizes this issue as "faith specific liturgical and religious requirements." Defs.' Mot., Ex. 15 at v. Simply put, the plaintiffs' plan assumes that individual religious adherents share the same level of religious practice and, therefore, need for clergy. The Navy has found, by contrast, that the disparities in beliefs and practices "make it impossible to effectuate a perfect match between chaplains of faith group clusters and the needs of sea service personnel and their families." *Id.*, Ex. 14 at 4 (recognizing that "military personnel and their families who identify themselves as belonging to a particular religious tradition may or may not adhere as rigidly to the specific dogma of their stated religious denomination").

Third, the plaintiffs' recommended scheme presumes that clergy from one religious denomination are unable to cater to the religious needs of a service member from a different religious denomination. According to the Navy, however, "Protestant chaplains usually find ... that they can serve Protestants from many denominations by incorporating elements of worship generally acceptable to Protestants." Defs.' Mot., Ex. 15 at 6. For Roman Catholics, by contrast,

worship requirements and specific sacramental ministry "must be met by priests within the Roman Catholic faith group category." *Id.*

To summarize, a chaplaincy program which accurately accounts for the religious needs of the Navy (which is what the plaintiffs seek) would have to account for the various duty locations of religious service members, the religious needs of their religion generally, the religious needs of the service members specifically, and the level of accommodation that a clergy member of a different denomination, or faith for that matter, could serve to that service members. The Navy suggests that such a detailed analysis would unnecessarily "assign the Court the role of monitoring [the Navy's chaplaincy program] to ensure that accessions matched Navy demographics." Defs.' Mot. at 20. The court agrees.

If the court ordered the Navy to create a new accession system which accounted for these various complicating factors, the resulting Chaplaincy program would likely involve substantial government entanglement with religion, requiring the Navy to conduct routine surveys and studies into the religious habits and interests of its service members. *See* Pls.' Mot. at 44 (praying for the court to order the Navy to establish "objective criteria and procedures to identify [the Navy's] free exercise needs in the context of Defendants' operational requirements, and a plan to ensure the [chaplaincy] structure is focused on those needs and maintained through adequate accession

plans"); *see also,* Defs.' Mot., Ex. 18 at I-8 & I-9. Such entanglement would itself be susceptible to significant constitutional challenge. *See, e.g., Aguilar v. Felton,* 473 U.S. 402, 413 (1985), *rev'd on other grounds,* (noting that "pervasive monitoring by public authorities ... infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement").

Regarding practical considerations, the Navy concluded that "the need for chaplains is not directly related to the number of adherents to denominations included under the umbrella of a faith group category." Defs.' Mot. at 30 (citing Ex. 15 at I-6). Instead, the Navy has "learned that in providing for the free exercise of religion, [it] must consider units or installations, rather than individuals or broad statistical representation, as the primary criterion in being able to serve the cumulative total of individual requirements most effectively." Defs.' Mot., Ex. 15 at I-6.

Having considered the issue in depth and concluded that it is impractical to consider individual religious needs or broad statistical representations, the Navy's determination is entitled to deference by the court. *Goldman,* 475 U.S. at 508 (asserting that the court's must give "great deference to the 'professional judgment of military authorities' "). The Navy's current system does not beget a chaplaincy that is perfectly tailored to the free exercise needs of the Navy. Such a tailoring, however, is, according to the Navy, impossible

to achieve. And given the relaxed scrutiny applicable in cases in the military context, it is also not constitutionally required.

IV. CONCLUSION

For the foregoing reasons, the court grants the defendants' motion for summary judgment. An order consistent with this Memorandum Opinion is separately and contemporaneously issued on this 30th day of April, 2007.

RICARDO M. URBINA
United Stated District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REV. CHARLES E. LARSEN *et al.*, Plaintiffs,	:Civil Action No. 02-2005 (RMU)
v	:Document No.: 5
THE UNITED STATES NAVY *et al.*, Defendants.	:
	:
	:

MEMORANDUM OPINION

GRANTING IN PART AND DENYING IN PART THE DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This matter comes before the court on the defendants' motion to dismiss. The plaintiffs, Charles Larsen, Gregory McNear, David Myers and James Linzey, are four non-liturgical Protestant ministers who applied for but were denied commissions in the Navy Chaplain Corps("the Corps"). They bring suit against the Navy and the Secretary of the Navy ("defendants") to challenge "the systematic and pervasive religious prejudice in the accession decisions of the Corps." Compl. ¶ 2. Specifically, the plaintiffs allege that the Navy has established religious quotas for Navy chaplain accessions that intentionally favor liturgical clergy in violation of the First and Fifth Amendments

and the Religious Freedom Restoration Act. *Id.* The defendants move to dismiss for lack of subject matter jurisdiction and for failure to state a claim. For the reasons that follow, the court grants in part and denies in part the defendants' motion.

BACKGROUND

Because the facts of the present case are similar to several cases now pending before this court, the court limits its discussion of the plaintiffs' allegations to what will be necessary to resolve the instant motion. The plaintiffs are non-liturgical ministers, all with prior military service. Compl. ¶ 1. They applied to the Corps at various times in their careers, but the defendants rejected them because of a "systematic and pervasive religious prejudice" against non-liturgical faith groups. *Id.* ¶ 2. As part of this prejudice, the Navy favors liturgical Protestants, despite the under-representation of liturgical Protestant service personnel and an over-representation of non-liturgical Protestant service personnel. *Id.* ¶¶ 1-2.

The Defense Manpower Data Center ("DMDC") collects data on the religious preferences of individual Armed Forces members for the Department of Defense ("DOD"). *Id.* ¶ 8. According to the plaintiffs, this data indicates that:

> In stark contrast to their low and declining percentage of [Navy] personnel,

> the Protestant liturgical chaplain category consistently comprises over 33% of the Chaplain Corps, about three times the actual percentage of [Navy] personnel who identify a religious preference. In contrast, non-liturgical chaplains have never come close to an equivalence of their faith group percentage of those who identify a religious preference.

Id. ¶ 13.

As the plaintiffs claim, this over-representation of liturgical chaplains represents the Navy's conscious decision to insure that liturgical chaplains control the Corps. *Id.* ¶ 18. "Prior to some time around 1988," the defendants based the composition of the Corps on the religious demography of the country. *Id.* ¶ 16. Because proportional representation led to an increased number of non-liturgicals, the Corps became "concern[ed]." *Id.* ¶ 17. The defendants thus abandoned their goal of proportional representation and, in 1988, imposed a "Thirds Policy." *Id.* ¶ 18. Under this policy, the defendants divided the Corps into thirds: Roman Catholic, Protestant liturgical, and non-liturgical Christian and Special Worship. *Id.* Since the defendants implemented their Thirds Policy, their accession goals for chaplain candidates have not only been arbitrary, but also a "deliberate misrepresentation of the Navy's free exercise needs . . . for the purpose of minimizing the career opportunities for non-liturgical

clergy and . . . limit[ing] their influence in the Corps and in the Navy, and hinder[ing] the religious rights of non-liturgical personnel." *Id.* ¶ 22.

With regard to the individual plaintiffs, Rev. Larsen spent sixteen years in active duty in the Navy. Compl. ¶ 4(A). He left in 1982 to attend the Dallas Theological Seminary and complete the post-graduate education necessary to become a Navy chaplain. *Id.* While in the Dallas Seminary, Rev. Larsen applied to the Navy's Student Seminary Program but was not accepted. *Id.* In 1987, after graduating the Dallas Seminary, Mr. Larsen applied to join the Corps, but the Corps rejected him with a letter that stated that his non-liturgical faith group had "no quota." *Id.*

Rev. McNear served in the Air Force and the Colorado Air national guard prior to completing seminary in 1981. *Id.* ¶ 4(B). In 1993, he applied to the Navy to become a chaplain, but was told he needed additional post-graduate semester hours to meet the Corps' criteria. *Id.* Rev. McNear promptly completed these requirements and reapplied. *Id.* The Navy rejected his application, apparently because, among other things, Rev. McNear was too old and did not satisfy the "needs of the Navy". *Id.* As the plaintiffs maintain, however, the age explanation was a "sham" because liturgical Protestant candidates received age waivers during the same period, and the "needs of the Navy" is a "code-phrase" for an illegal quota system disfavoring nonliturgical Protestants. *Id.*

Rev. Myers began his career in the Navy in 1980 as a sailor and retired in 2001. *Id.* ¶ 4(C). He applied to the Corps in 2001. *Id.* Endorsed by the non-liturgical Southern Baptist Convention, Rev. Myers taught as a full professor at the Southern California Bible College and Seminary while in service and accumulated three masters degrees in religion-related subjects prior to applying to the Corps. *Id.* Nevertheless, the Corps denied Rev. Myers' application, stating that the Navy had filled its age waiver quota. *Id.* According to the plaintiffs, however, this explanation "makes no sense" because the Navy "has routinely given age waivers to liturgical clergy with no prior Navy experience." *Id.*

Finally, Rev. Linzy is endorsed by the Chaplaincy of Full Gospel Churches, a nonliturgical group. *Id.* ¶ 4(D). He spent three years of active duty as an Army chaplain and applied to become a Navy chaplain. *Id.* The Navy rejected his application – despite a shortage of chaplains – and explained to Rev. Linzy that he would have been viewed more favorably if he were a "baby baptizer" – that is, if he were *not* non-liturgical. *Id.*; *see also* Compl. ¶ 7(A) (noting that liturgical denominations are sometimes referred to as "high church" or "baby baptizers").

III. ANALYSIS

The plaintiffs argue that the defendants violated the First and Fifth Amendments and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb as

amended ("RFRA"). Compl. ¶¶ 2445. The plaintiffs also claim that the defendants fraudulently concealed evidence of the plaintiffs' cause of action. *Id.* ¶¶ 46-50. The plaintiffs seek declaratory relief, injunctive relief, and an order from the court directing the defendants to eliminate current and past bias and to provide certain remedies to the plaintiffs. *Id.* at 24. As to declaratory relief, the plaintiffs request a judgment that the Navy's accession policies violate the First and Fifth Amendments, the RFRA, and DOD regulations; that the Navy has unlawfully denied Rev. Larsen an opportunity to compete for the Seminary Program, a commission, a career, and a promotion; that the Navy's conduct has denied the other plaintiffs an equal opportunity to compete for a commission; and that the Navy has unlawfully caused Rev. McNear to lose a career in the Naval Reserve. *Id.* at 24-25. As to injunctive relief, the plaintiffs ask the court to stop the defendants from discrimination in chaplain accession and career development decisions and to stop the defendants from deriving accession goals that are not based on the Navy's religious needs. *Id.* at 25-26.

Finally, the plaintiffs ask the court to order the defendants to: eliminate vestiges of discrimination; to develop a neutral accession system; to allow the plaintiffs the opportunity to be commissioned as chaplains if they are otherwise qualified; and to create a plan to remedy the plaintiffs' lost opportunity for career and promotion opportunities, including, depending on the plaintiff, opportunities to serve on

active duty, constructive credit for active duty, constructive retirement pay, and relief under the Little Tucker Act, 28 U.S.C. § 1346(a)(2). *Id.* at 26-27.

The defendants move to dismiss for lack of subject-matter jurisdiction and for failure to state a claim on which relief can be granted. *See generally* Defs.' Mot. to Dismiss ("Defs.' Mot"). The court now turns to the defendants' specific arguments.

A. Subject Matter Jurisdiction

1. Legal Standard for Motion to Dismiss for Lack of Subject-Matter Jurisdiction

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938); *see also Gen. Motors Corp. v. Envtl. Prot. Agency*, 363 F.3d 442, 448 (D.C. Cir. 2004) (noting that "[a]s a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction").

Because "subject-matter jurisdiction is an 'Art. III as well as a statutory requirement[,] no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxite de Guinea*, 456 U.S. 694,

702 (1982)). On a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court may dismiss a complaint for lack of subject-matter jurisdiction only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Because subject-matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003); *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

2. Commissioning

The defendants argue that the court lacks subject-matter jurisdiction over the plaintiffs' demand to be commissioned as officers because granting this relief "would require the [c]ourt to intrude intolerably into powers vested exclusively in the Executive and Legislative branches and . . . require the [c]ourt to make complicated military personnel and policy decisions." Defs.' Mot. at 7-8 (citing *United States v. Sheurer*, 473 U.S. 52, 58-59 (1985), *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953), and *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C.Cir. 1989)). Additionally, the defendants argue that any judicial second-guessing of the Navy's "own assessment" of its personnel needs "could jeopardize the Navy's operational readiness" or disrupt "military readiness." Defs.' Mot. at 9.

Although the court realizes the importance of letting the Navy run the Navy, *cf. Orloff*, 345 U.S. at 93-94, the court finds it difficult to comprehend what an allegedly unconstitutional practice in the hiring of Navy chaplains has to do with "operational readiness." In any event, the court does not (and will not) read the plaintiffs' submissions to demand that the court actually commission them in the Navy. *See* Opp'n at 7; Reply at 10 n.2. Rather, the reasonable reading of the plaintiffs' complaint is that the plaintiffs seek to compete for a position without the Navy subjecting them to an allegedly unconstitutional hiring practice. And the court is well within its authority to adjudicate

that. *Emory v. Secretary of the Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987); *cf. Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (stating that "this Court has never held, nor do we now hold, that personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service"); *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979) (noting that "courts have shown extreme reluctance to interfere with the military's lawful exercise of its discretion over internal management matters," but pointing out that this principle "is wholly inappropriate . . . when a case presents an issue that is amenable to judicial resolution. Specifically, courts have shown no hesitation to review cases in which a violation of the Constitution, statutes, or regulations is alleged"). Accordingly, the court reads the plaintiffs' complaint to request an opportunity to be considered for commission in the Corps without an intentionally illegal set of hiring criteria. The court has authority to adjudicate this claim and therefore denies the defendants' motion to dismiss for lack of subject-matter jurisdiction on this point.

3. Money Damages

Among other forms of relief, the complaint requests an order requiring the Navy to provide the court with "a plan to remedy Plaintiffs' lost opportunity for career and promotion opportunities." Compl. at 26. For Rev. Larsen, the plaintiffs request that this plan provide "constructive credit for active duty for the years

between when the Navy denied his application and his commissioning," and, "upon his subsequent retirement, award of retirement pay as at least a Lieutenant Commander"; for Rev. McNear, "constructive credit for three years active duty service and the opportunity to serve in the Naval Reserve as a chaplain"; and for Rev. Linzey, "such compensation as is appropriate under 28 U.S.C. § 1346(a)(2)."[13]

The defendants argue that the above relief constitutes money damages and that sovereign immunity bars this form of damages. Defs.' Mot. at 10. The defendants further argue that the limited waiver of sovereign immunity under 5 U.S.C. § 702 does not apply to this case. The plaintiffs respond that they seek equitable relief for which the government has waived immunity. Opp'n at 14-15. As to compensation under § 1346(a)(2), the plaintiffs make a general argument that "some damages flowing proximately from deprivations of constitutional rights are compensable." *Id.* at 31.

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). The Administrative Procedure Act ("the APA") waives sovereign immunity for suits seeking judicial review of federal administrative agency action. 5 U.S.C. § 702.

---

[13] Rev. Myers seeks "the opportunity to serve as a Navy chaplain." Compl. at 26.

The waiver of immunity does not apply to suits for money damages. *Id.* (waiving immunity for an "action in a court of the United States *seeking relief other than money damages*") (emphasis added).

To determine the applicability of § 702, courts distinguish specific relief and money damages. *Hubbard v. EPA*, 982 F.2d 531, 532 (D.C. Cir. 1992). Specific relief, for which § 702 waives immunity, "attempt[s] to give the plaintiff the very thing to which he was entitled." *Id.* at 533 (quotations and citation omitted). "Money damages," for which the government retains immunity, "normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss[.]" *Department of the Army v. Blue Fox*, 525 U.S. 255, 262 (1999) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988)). In *Hubbard*, for example, the court held that a victim of an unconstitutional denial of employment could request reinstatement, but not back pay:

> The only "entitlement" that the [employer] deprived Hubbard of was the job offer he would have received except for the constitutional deprivation. Instatement is the specific relief for that deprivation; it gives Hubbard "the very thing" he was owed. On the other hand, any loss of income attributable to Hubbard's being denied the job, like any emotional distress or harm to reputation that he may have

> suffered as well, is a consequence of the denial of the offer of employment. And the classic remedy for that loss is money damages.

Hubbard, 982 F.2d at 533.[14]

As in *Hubbard*, the plaintiffs seek reinstatement (or, more accurately, the *opportunity* to be considered for a job without an allegedly unconstitutional barrier). The government is not immune to that request. 5 U.S.C. § 702. The critical question, then, is whether the plaintiffs' additional request for constructive and retirement credit is similar to the additional and impermissible request the plaintiff made in *Hubbard* for back pay. The plaintiff in *Hubbard* wanted compensation for the time he was unable to work in the job he sought. 982 F.2d at 532. Unlike that plaintiff, the plaintiffs here ask for a constructive credit that would in effect boost their starting salary (assuming they obtained employment after passing a new hiring

---

[14] Even if "success on the merits may obligate the United States to pay the complainant," an action can still be considered non-monetary for the purposes of § 702. *Kidwell v. Department of the Army*, 56 F.3d 279, 284 (D.C. Cir. 1995). "[A]s long as the sole remedy requested is declaratory or injunctive relief that is not 'negligible in comparison' with the potential monetary recovery," the government is not immune to the requested relief. *Id.* (quoting *Hahn v. United States*, 757 F.2d 581, 589 (3d Cir. 1985)).

process). Opp'n at 16. For some plaintiffs, that boost may also have monetary affects on their retirement packages. Id.

The fungible character of money no doubt complicates the analysis, *Hubbard*, 982 F.2d at 534 n.6, but in the end the court cannot find a meaningful distinction between this case and *Hubbard*. The plaintiffs never obtained the chaplain positions and thus the law deems them unentitled to whatever pay-level increases or enhanced retirement prospects that one in those positions would normally acquire. *Cf. id.* at 533 (stating that "[a]t the time the EPA violated Hubbard's rights by denying him an offer of a job . . . he had never worked for the EPA and thus was not entitled to any pay"). Constructive and retirement credit would therefore amount to little more than compensation for "loss of income attributable to . . . being denied the job." *Id.*[15] Because § 702 bars compensatory claims of this

---

[15] *See also Dilley v. Alexander*, 627 F.2d 407, 409 (D.C. Cir. 1980). The plaintiffs cite *Dilley* to support their claims for constructive credit. Opp'n at 16. As the plaintiffs appear to acknowledge, however (*see id.*), the plaintiffs in *Dilley* were in a significantly different posture than the plaintiffs in this case: in *Dilley*, the plaintiffs were never lawfully discharged and "so in the eyes of the law, they remain[ed] in service." 627 F.2d at 411. Thus, the *Dilley* court held that the improperly discharged plaintiffs would be "retroactively reinstated to the positions they held on their respective dates of separation, with full active duty back pay, allowances

sort, the plaintiffs may not request constructive and retirement credit.

As to Rev. Linzey's request for compensation under 28 U.S.C. § 1346(a)(2) ("The Little Tucker Act"), the defendants argue that the plaintiffs have failed to demonstrate a "substantive constitutional or statutory right to damages against the United States that would allow Linzey to proceed with a claim under the Little Tucker Act." Reply at 19. The court agrees. The Little Tucker Act "does not create any substantive right enforceable against the United States for money damages." *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (internal quotations omitted). "The courts have uniformly held that jurisdiction under the 'founded upon the constitution' grant of the Tucker Act is limited to claims under the 'takings clause' of the Fifth Amendment." *Clark v. Library of Congress*, 750 F.2d 89, 104 n.31 (D.C. Cir. 1984). Accordingly, because the plaintiffs do not bring a claim under the takings clause for Rev. Linzey, their claim as to Rev. Linzey is non-justiciable under the Little Tucker Act. *Id.*

4. Standing

The plaintiffs' request for prospective relief has

---

and other benefits of service, including active duty credits (based on constructive service) for retirement purposes." *Id.*

an injunctive and a declaratory component.[16] The defendants argue that the plaintiffs do not have standing to pursue either of these forms of prospective relief because plaintiffs fail to establish immediate or imminent injury and because the plaintiffs fail to establish redressability. Defs.' Mot. at 17.

a. Legal Standard for Standing

Article III of the Constitution limits the

---

[16] As to injunctive relief, the plaintiffs request that the court enjoin "[f]urther and future discrimination in chaplain accession and career development decisions against Plaintiffs and other nonliturgical Christian clergy based on their faith group and religious beliefs." Compl. at 25. The plaintiffs also request that the court enjoin the "[d]eriving [of] accession goals that are not based on [the Navy's] documented religious free exercise needs." *Id.* at 25-26. The plaintiffs seek a declaratory judgment on three points. First, that the Navy's accession policies and procedures are unconstitutional as applied and suppress the plaintiffs' fundamental rights. Compl. at 25. Second, that the Navy's conduct unlawfully denied Rev. Larsen "an opportunity to compete for the Student Seminary Program, a commission as a Navy chaplain, and a career in the Navy, including promotion to at least Lieutenant Commander." *Id.* Third, that the Navy's conduct unlawfully denied plaintiffs McNear, Myers and Linzey the "opportunity to compete for a commission as a Navy chaplain, such commission and initial active duty time as a chaplain, and for Plaintiff McNear, a career in the Naval Reserve." *Id.*

jurisdiction of federal courts to cases or controversies. U.S. CONST. ART. III, § 2, cl. 1. These prerequisites reflect the "common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Consequently, "a showing of standing is an essential and unchanging predicate to any exercise of a court's jurisdiction." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560(1992)).

As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing. *Defenders of Wildlife*, 504 U.S. at 561; *Steel Co.*, 523 U.S. at 104; *City of Waukesha v. Envtl. Prot. Agency*, 320 F.3d 228, 233 (D.C. Cir. 2003) (per curiam). The extent of the plaintiff's burden varies according to the procedural posture of the case. *Sierra Club v. Envtl. Prot. Agency*, 292 F.3d 895, 898-99 (D.C. Cir. 2002). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct will suffice. *Id.*

To demonstrate standing, a plaintiff must satisfy a three-pronged test. *Sierra Club*, 292 F.3d at 898 (citing *Defenders of Wildlife*, 504 U.S. at 560). First, the plaintiff must have suffered an injury in fact, defined as a harm that is concrete and actual or imminent, not conjectural or hypothetical. *Byrd v. Envtl. Prot. Agency*, 174 F.3d 239, 243 (D.C. Cir. 1999) (citing *Steel Co.*, 523 U.S. at 103). Second, the injury must be fairly traceable to the governmental conduct alleged. *Id.* Finally, it

must be likely that the requested relief will redress the alleged injury. *Id.* Our court of appeals has made clear that no standing exists if the plaintiff's allegations are "purely speculative[, which is] the ultimate label for injuries too implausible to support standing." *Tozzi v. Dep't of Health & Human Servs.*, 271 F.3d 301, 307 (D.C. Cir. 2001). Nor is there standing where the court "would have to accept a number of very speculative inferences and assumptions in any endeavor to connect the alleged injury with [the challenged conduct]." *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980).

b. Imminence of Injury

As a preliminary matter, the court notes that "[t]he reference to third parties, of course, does not help the . . . plaintiffs establish standing; to satisfy the requirements of Article III, they must allege that *they themselves* are likely to suffer future injury." *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corporation*, 28 F.3d 1268, 1273 (D.C. Cir. 1994) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 108-09 (1983)) (emphasis added). Narrowing its focus accordingly, the court proceeds to determine whether the plaintiffs are likely to suffer future injury. *See also Wagshal v. Foster*, 28 F.3d 1249, 1252 (D.C. Cir. 1994) (holding that the plaintiff lacked standing to seek an injunction on behalf of others); *Adair v. England*, 183 F. Supp. 2d 31, 63-64 (D.D.C. 2002). The plaintiffs have the burden of making this showing.

Lyons, 461 U.S. at 101-02.

The defendants argue that under *City of Los Angeles v. Lyons* and its progeny, the plaintiffs lack standing to request prospective relief because the prospect of future harm is speculative or hypothetical. Defs.' Mot. at 15. As the defendants state, "it is purely speculative whether any of [the plaintiffs] will ever apply [to the Corps] again." Reply at 4. In *Lyons*, the Court denied a claim for injunctive relief because the respondent could not "establish a real and immediate threat" that the harm he suffered would occur in the future. 461 U.S. at 105; *see also Hedgepeth v. Washington Metropolitan Area Transit Authority*, 2004 WL 2381320, *3 (D.C. Cir. 2004). The *Lyons* Court explained that although police may have applied an illegal chokehold to the respondent in the past, and although the respondent alleged that "police in Los Angeles routinely apply choke holds in situations where they are not threatened by the use of deadly force," the respondent failed to demonstrate any danger of the same harm occurring to him in the immediate future. 461 U.S. at 105-06. Moreover, in language that the D.C. Circuit has characterized as possibly "hyperbolic," *Fair Employment Council*, 28 F.3d at 1274, the Court went on to state precisely what the respondent would have to allege to justify injunctive relief:

> Lyons would have had not only to allege that he would have another encounter with the police but also to make the

> incredible assertion either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner.

Lyons, 461 U.S. at 105-06.

Similarly, in *Lujan* the Court applied the reasoning of *Lyons* and held that the plaintiffs failed to show imminent injury for injunctive relief because they could not show a sufficient likelihood that they would return to areas potentially affected by the Endangered Species Act. 504 U.S. at 564. The Court rejected the plaintiffs' profession of an "intent" or "hope" to return: "[s]uch 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* (emphasis in original).

In *Fair Employment Council*, the D.C. Circuit applied the rationale articulated in *Lyons* to reject claims for prospective relief. 28 F.3d at 1273. The plaintiffs in *Fair Employment Council* were black "testers" for the Fair Employment Council of Greater Washington, which sent the plaintiffs with comparably credentialed white testers to the BMC Marketing

Corporation to determine who would get job employment referrals. *Id.* at 1270. As it turned out, the white testers were treated more favorably than the black testers, and the Fair Employment Council brought suit, seeking damages and injunctive relief. *Id.* In addressing the plaintiffs' claims for prospective relief, the court stressed that "the tester plaintiffs must allege a likelihood of future *violations* of their rights by [the defendant], not simply future *effects* from past violations." *Id.* at 1273 (emphasis in original). The court stated that "nowhere does the complaint assert that the tester plaintiffs are likely *ever* to return to BMC seeking employment referrals, let alone that they will do so at any point 'in the reasonably near future.'" *Id.* (emphasis in original) (citing *Lyons*, 461 U.S. at 108); *see also Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 500-01 (D.C. Cir. 1994) (rejecting a claim of future injury which, although stated with more specificity than the claim in *Lujan*, merely stated that "at some undefined future time" the plaintiff might be harmed).

Unlike the plaintiffs in *Lyons*, the plaintiffs here would not need to engage in the sort of outrageous and conjectural sequence of events that the *Lyons* Court determined would be necessary for future injury. *Lyons*, 461 U.S. at 105-06; *see also Nelsen v. King County*, 895 F.2d 1248 (9th Cir. 1990) (noting that, in order to have standing, the plaintiffs "would have to remain within King County, remain indigent, begin drinking uncontrollably several years after their discharge from

the Center (and after they have testified that they are recovering alcoholics) commit an alcohol-related offense, be prosecuted for that offense, be convicted, be offered the choice to reenter the Center, make that choice, and find that the conditions at the Center were the same as they allegedly were when [the plaintiffs] were there in 1985 and 1986"). Instead, the question of the plaintiffs' standing in this case comes down to determining whether the plaintiffs plan to reapply to the Corps – and, if they do plan to reapply, whether their plan is a mere "some day" intent or hope. *Lujan*, 504 U.S. at 564.

Were this case at the summary judgment stage, this court could not construe the plaintiffs' "interest[] in becoming chaplains" more favorably than the "some day" plans in *Lujan* – plans which, the Court in *Lujan* noted, lacked concreteness "or indeed even any specification of *when* the some day will be." *Id.* (emphasis in original). As *Lujan* instructs, however, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at 561 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)); *accord American Society For Prevention of Cruelty to Animals v. Ringling Bros. and Barnum*, 317 F.3d 334, 335 (D.C. Cir. 2003).

With this lenient pleading standard in mind, it is reasonable – although no doubt a close call – to infer

that the plaintiffs' general allegations embrace a concrete plan to reapply to the Corps. *Lujan*, 504 U.S. at 561. Although the plaintiffs do not make the task easy and specify in their pleadings a date when they will reapply to the Corps,[17] they seek opportunities to be reconsidered for admission to the Corps once the allegedly discriminatory barrier is removed. *E.g.*, Compl. at 26; Opp'n at 20-25. Further, the plaintiffs cite the prospect of "future discrimination in chaplain accession and career development decisions against Plaintiffs." Compl. at 25. From this statement and the plaintiffs' expressions of desire to be in the Corps (which expressions this court assumes to be true), the court can reasonably infer that the plaintiffs would reapply as soon as the discriminatory barrier is removed. *See* Compl. at 26 (requesting a court order allowing the plaintiffs, "if otherwise qualified, the opportunity to be commissioned as Navy chaplains"); *cf. American Society For Prevention of Cruelty to Animals*, 317 F.3d at 337-38 (holding that although the plaintiff did not indicate when he would visit the harmed animals again or what such a visit would entail, it was sufficient that the plaintiff "stated a desire" to enjoy the animals again "upon the cessation of the defendant's actions"). Accordingly, the plaintiffs plead sufficient injury.

---

[17] *Cf.* B. Woodward & S. Armstrong, *The Brethren* 192 (1981) (noting Justice White's comment that "[w]hy didn't the Sierra Club have one goddamn member walk through the park and then there would have been standing to sue?").

c. Redressability

Although the parties focus their standing arguments almost exclusively on the existence of an injury, the defendants also argue that the plaintiffs fail to establish redressability. Defs.' Mot. at 17. The defendants claim that injunctive orders are inappropriate relief for past harms and that, "to the extent plaintiffs allege that injunctive or declaratory relief is necessary to prevent alleged discrimination in future accessions," an interest in deterrence cannot establish redressability. *Id.* at 18. The plaintiffs respond that an injunction is necessary "to force the Navy to return to the religious neutrality mandated by the First Amendment." Opp'n at 21.

To survive a motion to dismiss on redressability grounds, a plaintiff "must allege facts from which it reasonably could be inferred that, absent the [challenged policy], there is a substantial probability that . . . if the court affords the relief requested, the asserted [injury] will be removed." *Warth*, 422 U.S. at 504; *National Wrestling Coaches Ass'n v. Dept. of Educ.*, 366 F.3d 930, 937 (D.C. Cir. 2004) (stating that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision") (internal quotations omitted). At this stage of the proceedings, the court determines that it is reasonable to infer that if the Navy dropped the alleged discriminatory bias, the plaintiffs would have a fair chance to compete for a position in the Corps, thus

removing the asserted injury. *Warth*, 422 U.S. at 504.[18] Accordingly, the plaintiffs plead redressability.

d. Capable of Repetition Yet Evading Review

Although the court has determined that the plaintiffs have standing at this juncture of the case, the court addresses a separate standing argument that the plaintiffs raise to avoid having the argument resurface at a later stage of the case. The plaintiffs' suggest that the exception to the mootness doctrine for harms capable of repetition yet evading review is "[i]n some ways" applicable here. Opp'n at 24. It is not. Under this exception, courts retain jurisdiction over certain injuries that start and end more quickly than the judicial process can render a decision. *See, e.g., Roe v. Wade*, 410 U.S. 113, 125 (1973) (noting that "the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete" and that if the end of the gestation period "makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied").

As the plaintiffs argue,

---

[18] Because the court makes all reasonable inferences in favor of the plaintiffs at this stage of the proceedings, the court does not now evaluate issues such as the likelihood of age waivers.

> [u]nchecked by a judicial decision, the Navy can continue this game of favoritism for some preferred faith groups while prejudicing others. The question is not whether Plaintiffs will apply for commissions again. The question is whether the same prejudice will meet them if their claims are found valid by the Court.

Opp'n at 25. The problem with this argument, however, is that the plaintiffs raise an exception to mootness in response to an attack on standing in a case where the defendant does not argue mootness. However persuasive the analogy might sound, the Court in *Lyons* rejected the Ninth Circuit's application of this exact line of reasoning. 461 U.S. at 109. As the Court stated, "the issue here is not whether that claim has become moot but whether Lyons meets the preconditions for asserting an injunctive claim in a federal forum." *Id.* Mootness, in other words, typically occurs after the plaintiff at least momentarily possesses standing but then loses it because of an intervening event. *Nelson*, 895 F.2d at 1254.

5. Fraudulent Concealment

The defendants argue that even if the plaintiffs have standing, the relevant statute of limitations bars certain of the plaintiff's claims. Defs.' Mot. at 18 (citing 28 U.S.C. § 2401(a)). Title 28 U.S.C. § 2401(a)

establishes a six-year statute-of-limitations period for a plaintiff to commence a civil action against the United States after the right of action first accrues. As the defendants argue, because the plaintiffs brought their complaint in this case in October 2002, § 2401(a) bars any claims that accrued prior to October 1996. Defs.' Mot. at 18. The plaintiffs respond that the statute of limitations is subject to equitable tolling and that in a case such as this – a case that involves allegations of fraudulent concealment – the court should allow factual development rather than dismissing the complaint outright. *See, e.g.*, Opp'n at 26.

The court agrees with the plaintiffs. In a related opinion in which this court refused to address a similar fact-dependant statute of limitations argument on a motion to dismiss, the court held:

> The D.C. Circuit has made it clear that "when a defendant fraudulently conceals the basis of a plaintiff's cause of action, the statute of limitations is tolled until the time that a reasonably diligent plaintiff could have discovered the elements of his claim." *Hohri*, 782 F.2d at 246. The question in this case then becomes whether the defendants fraudulently concealed the basis of the plaintiffs' claims. But this court need not decide the issue at this juncture. This is because the D.C. Circuit has held that "courts should

> hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint." *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (citing *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir.1981)). The D.C. Circuit has also instructed that "because statute of limitations issues often depend on contested questions of fact, dismissal is appropriate onlyif the complaint on its face is conclusively time-barred." *Firestone*, 76 F.3d at 1209 (citing *Richards*, 662 F.2d at 73).

Adair v. England, 183 F. Supp. 2d 31, 54 (D.D.C. 2002); *see also Adair v. Johnson*, 276 F. Supp.2d 79, 81 & n.2 (D.D.C. 2003). The court sees no reason to depart from this reasoning and accordingly denies without prejudice the defendants' motion to dismiss certain claims on limitations grounds. *See id.*

B. Failure to State a Claim

1. Legal Standard for Rule 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds

upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003) (citing FED R. CIV. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 47-48 (internal quotation marks omitted). It is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint, *Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 511-14 (2002), or "plead law or match facts to every element of a legal theory." *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) (internal quotation marks and citation omitted).

Accordingly, "the accepted rule in every type of case" is that a court should not dismiss a complaint for failure to state a claim unless the defendant can show beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Warren v. District of Columbia*, 353 F.3d 36, 37 (D.C. Cir. 2004); *Kingman Park*, 348 F.3d at 1040. Thus, in resolving a Rule 12(b)(6) motion, the court must treat the complaint's factual allegations – including mixed questions of law and fact – as true and draw all reasonable inferences therefrom in the plaintiff's favor. *Macharia v. United States*, 334 F.3d 61, 64, 67 (D.C. Cir. 2003); *Holy Land Found. for Relief & Development v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003); *Browning*,

292 F.3d at 242. While many well-pleaded complaints are conclusory, the court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren*, 353 F.3d at 39; *Browning*, 292 F.3d at 242.

2. The RFRA

The plaintiffs claim that the defendants violated the RFRA by "deliberately treat[ing] Plaintiffs in a discriminatory manner and differently than other similarly situated chaplains on the basis of their faith group and religious beliefs." Compl. ¶¶ 43-45. The plaintiffs further claim that the defendants' "policies are deliberately motivated by faith group bias and prejudice." *Id.* ¶ 44. The defendants respond that the plaintiffs "fail to demonstrate how the Navy has placed any burden whatsoever on their religious beliefs or practices." Defs.' Mot. at 24.

Congress enacted the RFRA in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). 42 U.S.C. § 2000bb(a)(4). As stated in § 2000bb(a)(4), that decision "virtually eliminated the requirements that the government justify burdens on religious exercise imposed by laws neutral toward religion." *Id.* The RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates a "compelling governmental interest" and uses the "least

restrictive means" of furthering that interest. 42 U.S.C. § 2000bb-1(a), (b); *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 166-68 (D.C. Cir. 2003). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held the RFRA unconstitutional as applied to state action. *Id.* at 514. However, "the portion of RFRA remaining after *City of Boerne* . . . the portion . . . applicable to the federal government . . . survived the Supreme Court's decision striking down the statute as applied to the States." *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001) ("*Henderson II*").

To establish a prima facie case under the RFRA, a plaintiff must show that the government action at issue works a substantial burden on the plaintiff's ability to freely exercise his sincere religious beliefs. *E.g., O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1173 (10th Cir. 2003). The RFRA defines "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A), incorporated by 42 U.S.C. § 2000bb-2(4); *Henderson II*, 265 F.3d at 1073. If the government action does create a substantial burden, a court can still uphold the action if the defendant shows that the action serves a compelling government interest in the least restrictive manner possible. 42 U.S.C. § 2000bb-1(b); *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 38 (D.D.C. 2002).

Regarding the substantial burden prong, the defendants cite *Henderson v. Kennedy*, 253 F.3d 12

(D.C. Cir. 2001) ("*Henderson I*"), for the proposition that the RFRA protects against restrictions on central beliefs or practices, but not restrictions on religiously motivated conduct. Defs.' Mot. at 24 (citing *Henderson I*, 253 F.3d at 17). Thus, although the defendants concede that the plaintiffs "allege that the Navy's purported discrimination has resulted in the denial of their application to join the Chaplain Corps," the defendants maintain that service in the Navy Chaplain Corps represents unprotected conduct, not "a central belief or practice of [the plaintiffs'] respective faith," Defs.' Mot. at 25.

The question of whether or not the plaintiffs establish a substantial burden is of course an element of a claim under the RFRA. Although the parties debate what constitutes a substantial burden, they do not address what would seem to be a critical preliminary point: whether the RFRA even applies to this case. In *Hartman v. Stone*, the court held that the RFRA is inapplicable if a regulation is not neutral and generally applicable. 68 F.3d 973, 978 (6th Cir. 1995) (noting that Congress passed the RFRA in response to case law regarding neutral and generally applicable rules and that such case law did not intend "to affect the methodology of dealing with those laws or rules that directly burden religion because the are not neutrally and generally applicable"). Indeed, the vast majority of cases concerning the RFRA deal with neutral and generally applicable laws, not the types of claims involved in the instant case. *See, e.g., O Centro*

Espirita, 342 F.3d at 1173 (discussing the impact of the penalties for substances containing dimethyltryptamine on the sacramental use of hoasca); *Holy Land Found.*, 333 F.3d at 160 (discussing a Treasury Department designation of a purported Muslim charity as a terrorismsupporting organization); *United States v. Israel*, 317 F.3d 768, 769 (7th Cir. 2003) (discussing whether revocation of supervised release for marijuana use violates the religious rights of a practicing Rastafarian); *Guam v. Guerrero*, 290 F.3d 1210, 1222-23 (9th Cir. 2002) (discussing Rastafarians and marijuana laws); *Hamilton v. Schriro*, 74 F.3d 1545, 1555-56 (8th Cir. 1996) (discussing the use of sweat lodges by American Indians and prison regulations).

An important question, then, is what constitutes a neutral and generally applicable law. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court explained that "[a]lthough a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." 508 U.S. 520, 533 (1993) (internal citations omitted). To determine the object of the law, the court must of course look at the text of the law. *Id.* But examination of the law does not stop at ostensible facial neutrality. *Id.* at 534. "The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause forbids subtle

departures from neutrality, and covert suppression of particular religious beliefs." *Id.* (internal citations and quotations omitted). Moreover, "'[t]he Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" *Id.* (citing *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)); *American Family Ass'n, Inc. v. F.C.C.*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (stating that "even facially neutral laws and regulations violate the free exercise clause if in practical effect they target religious faith or speech to an extreme degree").

In this case, the plaintiffs challenge what they describe as a "systematic prejudice" involving "illegal religious quotas" and the establishment of "a preferred religious tradition and a religious patronage system." Compl. ¶ 2; *see also id.* ¶¶ 13-23, 31, 41, 44. To the extent that such accusations refer to a specific targeting of the plaintiffs *qua* non-liturgical Protestants, the plaintiffs clearly do not plead a neutral or generally applicable law or allow any reasonable inference thereof. *See Hartman*, 68 F.3d at 978 (holding that "if the regulations are not neutral and generally applicable, [the court] need not address the [RFRA]"); *cf. Lukumi*, 508 U.S. at 536 (noting that "[t]he net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice"); *id.* at 557 (Scalia, J., concurring) (noting that "the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their

design, construction, or enforcement target the practices of a particular religion for discriminatory treatment") (citing *Fowler v. Rhode Island*, 345 U.S. 67 (1953)).

One result of the above conclusion is that, because the plaintiffs do not challenge a neutral or generally applicable law, the plaintiffs need not plead a substantial burden, although they do of course need to plead "a sufficient interest in the case to meet the normal requirement of constitutional standing." *Hartman*, 68 F.3d at 979 n.4. Yet, for the purposes of resolving the defendants' motion to dismiss the plaintiffs' RFRA claim, the court determines that the plaintiffs are clearly outside the realm of the RFRA. In short, making all reasonable inferences in favor of the plaintiffs, this case in not about a neutral law of general applicability. Rather, the plaintiffs make it clear that they are attacking what they consider to be an intentionally discriminatory policy. Compl. ¶ 2; *see also* Id. ¶13-23, 31, 41, 44. Accordingly, the court dismisses the plaintiffs' RFRA claim.

IV. CONCLUSION

For the foregoing reasons the court grants in part and denies in part the defendants' motion to dismiss. An order consistent with this Memorandum Opinion is separately and contemporaneously issued on this 18th day of November, 2004.

RICARDO M. URBINA

United States District Judge